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ABSTRACT

The supplement to an earlier edition provides information on case developments relating to the labeling and grouping of both normal and exceptional children for educational treatment. Case summaries and notes are divided into five sections (sample topics are in parentheses): exclusion of exceptional children (the handicapped child's right to an education at the state's expense and class action on behalf of the handicapped), exclusion of normal children (sex discrimination and disciplinary exclusion), procedural safeguards (due process hearings, cases on testing, confidentiality of records, and behavior modifying drugs), inadequate programs (bilingual cases, inadequate programs for handicapped children, and the failure to teach basic academic skills in regular classes), tracking (ability grouping practices), and federal law (the Rehabilitation Act of 1973, federal assistance to states for educating handicapped children, and the Education for All Handicapped Children Act--Public Law 94-142). (SBH)

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Student Classification Materials

June 1976 Supplement

A Supplement to *Classification Materials,*

Revised Edition, September 1973

Center for Law and Education
14 Appian Way Larsen Hall
Cambridge, Massachusetts 02138

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Introduction

The term "classification" is used to suggest a lawyer's basic approach to the labeling and grouping of children into different categories for different kinds of educational treatment. Exclusion of some pupils from all public education is the most extreme form of classification. The most litigated kind of classification involves children considered in need of special educational programing because of "handicap" ("exceptionality"). Classifying decisions are subject to analysis under the equal protection and due process clauses of the U.S. Constitution and, increasingly, under federal statutory law. In addition, there may be state constitutional provisions, statutes, and regulations with which schools must comply in classifying children.

This Supplement updates our Classification Materials, Revised Edition, September 1973 (hereafter "the 1973 Edition"). We decided to publish a supplement rather than a new edition because, while there have been important developments in some of the areas covered by the 1973 Edition, those materials remain basically up-to-date. Therefore this Supplement should be used as a supplement to rather than as a substitute for the 1973 Edition. The 1973 Edition is available from the Center for Law and Education.*

These supplementary materials follow the same organization as the 1973 Edition. The Table of Contents integrates materials included in both the 1973 Edition and this Supplement, with all supplementary materials separately paginated for easy cross-reference. Thus the basic papers in the Mills case, for example,

are found at pages 31-117 of the 1973 Edition, and the subsequent contempt holding and order appointing a special master are summarized at page 5 of the Supplement.

This Supplement consists mainly of case developments and notes which have been prepared for the Education Law Bulletin, Inequality in Education, and other publications of the Center for Law and Education. Case summaries prepared by other persons or organizations are specifically attributed.** Clearinghouse Review numbers are included where available, and legal services attorneys can secure those papers by writing to the National Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 2220, Chicago, Illinois 60611. Many of the other items are available upon request from the Center for Law and Education.* For continuing developments, interested persons should consult in particular the Education Law Bulletin which is published every eight to ten weeks.

A new part on Federal Law has been added to the Classification Materials by this Supplement. This reflects the adoption of a greater number of federal statutes and regulations affecting the classification of school children, especially for purposes of special education. One of the most important of these is Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of handicap in programs receiving federal financial assistance. This section could become as important to handicapped persons as Title VI of the Civil Rights Act of 1964 is to Black persons.

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*The implementation of the new Legal Services Corporation Act may alter the Center's past policy of providing materials free to legal services attorneys and at cost to others. The extent to which the Center can provide materials upon request under the new Act was undetermined as of the publication date of this Supplement.

**Clearinghouse Review summaries in the text are abbreviated as CR; Education Law Bulletin summaries as ELB.

In addition to the publications cited in this Supplement and the 1973 Edition, persons interested in more detailed information about the legal, educational and social aspects of student classification may want to consult in particular Issues in the Classification of Children (2 vol.) (Jossey Bass: San Francisco 1975) edited by Nicholas Hobbs; the periodical Exceptional Children which includes significant research findings, successful teaching methods and current issues in special education; and the publication lists which are available from the following organizations: The Council for Exceptional Children, 1920 Association Drive, Reston, Va. 22091 (703--620-3660), The National Center for Law and the Handicapped, Inc., 1235 North Eddy Street, South Bend, Indiana 46617 (219--288-4751), The Children's Defense Fund, 24 Thorndike, Cambridge, MA 02141 (617--492-4350), and The Center for Law and Education, Larsen Hall, 14 Appian Way, Cambridge, MA 02138 (617--495-4666).

Legal services attorneys who would like assistance (reviewing litigation papers, discussing legal strategy, etc.) in cases involving student classification are encouraged to write or call the Center for Law and Education. Also, we hope that you will keep us informed of developments in your area so that we can help others learn from your practice.

KARI

I. Exclusion of "Exceptional" Children

I.B.3. *Mills v. D.C. Board of Education:* Contempt Order and Appointment of Special Master

Mills v. Bd. of Ed., C.A. No. 1939-71, D.D.C., Orders and Opinions filed, 3/27/75, 4/22/75

Motion to enforce orders requiring District of Columbia to provide handicapped and exceptional children "an education geared to their needs." See 348 F.Supp. 866. Rulings: (1) The superintendent, board of education members, the director of the department of human resources and the mayor are in contempt for failing to make appropriate placements of members of the class and to notify the court of problems preventing compliance. Since money has been provided to place 43 students, the question of sanctions may be deferred. (2) The system shall report on identification of other students in need of services and steps taken to provide them; "all children identified as being in need of educational placements shall be immediately and appropriately placed." (3) Defendants shall file a plan of "future implementation of and compliance with" the orders. (4) The court holds in abeyance plaintiffs' motion for appointment of a master, mentioning the effect it will have on "money ... available for the main problem ...." (5) Plaintiffs' request for attorneys' fees is denied because "counsel [are] paid by organizations whose purpose it is to act as public-interest representatives and they ... admit that they took this representation without fee."

Note: The Supreme Court has recently held that, generally speaking, private attorneys will not be awarded attorneys' fees, under a private attorney general theory, in the absence of specific congressional authorization. Alyeska Pipeline Service v. The Wilderness Society, 43 U.S.L.W. 4561 (May 13, 1975).

ELB

Mills v. Board of Education of the District of Columbia, C.A. No. 1939-71, Order Appointing Special Master, 7/23/75 (Clearinghouse #7141)

A special master has been appointed in the Mills case (an Associate Professor of Special Education, University of Georgia). His duties include to "investigate and assess the appropriateness and suitablity of special education programs for pupils in need of special services within the public school system" (p. 2), to "review the adequacy of the procedures by which [children with special needs are] identified, assessed and placed" (p. 2), to report on procedures developed to implement the court order, to "review budgetary estimates and justifications for special education made by the defendant" (p. 2), to assist the system in preparing a plan "for the future implementation of the court's decree" (p. 3), and to file a final report including "specific recommendations to [the court] concerning all proper and necessary remedial actions" (p. 3). The master is not to give directions to or supervise system employees. The defendants are to pay the special master and cooperate fully with him.

ELB

Note: For a discussion of the problems experienced in implementing the Mills and P.A.R.C. decrees, see D. Kirp, W. Buss, & P. Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 Cal.L. Rev. 40 (1974)

I.D.3. Other Cases Based on State Law

Rainey v. Tennessee Department of Education, C.A. No. A-3100, Tennessee Chancery Court at Nashville, Memorandum, 1/21/76 (C'house 11,585 I)

Ruling on contempt petition alleging that defendants failed to comply with July 1974 consent decree on provision of special education services. The agreement required, in part, that (a) services would be provided for "all handicapped children" not later than the fall of 1975; (b) in the event of non-compliance by local systems the State Department of Education would withhold funds from the local system and/or directly provide services; and (c) the defendants would enforce the compulsory attendance law in cases involving handicapped students. As of May 1975, 805 children were totally excluded from education and 7168 were partially excluded. Rulings: (1) The defendants are in violation of the order and have not satisfied their burden of showing "their inability to comply...." While an inadequate legislative appropriation is a factor in the non-compliance, the problem results at least in part from "[t]he lack of coordination of programs and the delays in getting available funds into the hands of the local education agencies...." (p.5) (2) "[T]he failure to provide an equal educational opportunity for handicapped children is a denial of equal protection...." (p.5) (3) Within 45 days, the defendants shall file a report identifying all students in the state totally and partially excluded, the reasons for exclusion and the responsible local systems, and the steps being taken to implement the agreement. By July 1, 1976, defendants shall submit a plan for implementing the agreement for the 1976-77 school year. (pp.6-7) (4) While not ruling on the issue, the court expresses the view that where there is a shortage of funds "the whole program must suffer without discrimination as to members of a minority class." (p.7)

ELB

In re G.H., 218 N.W.2d 441 (N.D. 1974)

This case sustains the right of the handicapped to an education at state expense, holding that a handicapped child who was a ward of the state should have her tuition paid by the school district in which she had been living. The Court found that education was a fundamental right under North Dakota law and suggested that "G.H.'s terrible handicaps were just the sort of 'immutable characteristic determined solely by the accident of birth' to which the inherently suspect classification would be applied." 218 N.W. 2d at 447.

See also Denver Ass'n of Retarded Children, Inc. v. School Dist. No. 1 of Denver, 535 P.2d 200 (Colo. 1975), (if school district maintains free kindergartens for normal children it must also finance kindergartens for the handicapped); In re Kirschner, 74 Misc. 2d 20, 344 N.Y.S.2d 164 (Family Ct. 1973) (cannot charge parent for the cost of educating a handicapped child while providing free public education to others); In re M, 73 Misc. 2d 513, 342 N.Y.S.2d 12 (Family Ct. 1972) (physically handicapped child entitled to state funds for special school unless the public school system can prove it has adequate special facilities); Matter of Butcher, 373 N.Y.S.2d 514, (consolidated proceeding involving three petitions for payment of tuition and maintenance costs at a private institution for handicapped children); In re Devey, 370 N.Y.S.2d 351 (Family Ct, 1975)(the authority under Section 232 of N.Y. Family Court Act for the court to insure an appropriate education for handicapped students does not "[relieve] the parent of his support responsibility," and therefore father with $39,000 gross income ordered to pay $1,000 towards special program costing $3,480).

See also the Reid, M.A.R.C., McWilliams, and McNeil cases, Part IV.D. infra.

I.F. Other Cases Challenging Exclusion of Exceptional Children

Panitch v. State of Wisconsin, 390 F.Supp. 611 (E.D. Wisc., 1974) (3 judge court)

Class action on behalf of handicapped children with exceptional educational needs. Subsequent to the commencement of the action, a state law was enacted which was designed to provide specialized education to meet the needs of handicapped children and thus, in theory, satisfy plaintiffs' claims. The court ordered the proceedings stayed pending the effective implementation of the new state law and submission of a report on implementation. The state defendants submitted with their implementation report a motion to dismiss; plaintiffs filed a motion to vacate the stay on the ground that defendants' implementation of the new state law was unsatisfactory. Rulings: (1) Joint school district is suable under 28 U.S.C. 1331, but not 42 U.S.C. 1983.* (2) "[T]he court should not withdraw itself from this case until implementation is an established fact" (613) which is not the case when 25 out of 436 school districts have failed to submit implementation plans to the state. The fact that 25 out of 436 school districts have failed to submit implementation plans does not establish "dilatory conduct or inordinate delay in implementation [of the new law]" warranting vacating the stay. (613) (3) The requirement to provide all children with equal educational opportunity does not obligate the state to do so in the context of a neighborhood or conveniently accessible setting when a virtually infinite range of special education needs must be met with limited resources. (614) (4) The court need not appoint a master to consider parental claims of expenditures since the enactment of the state law because there is a state court remedy. (615) (5) Attorneys fees denied at this time. (6) Defendants must submit a further report on compliance. (616)

ELB

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* The Court cites City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973) for this proposition. In Bruno, the Supreme Court held that a city is not a "person" under 42 U.S.C. Sec. 1983 where equitable relief is sought, any more than it is where damages are sought, Monroe v. Pape, 365 U.S. 167, and the District Court, therefore, erred in concluding that it had jurisdiction over complaints under 28 U.S.C. Sec. 1343(3) since only the two municipalities were named as defendants. Courts, however, have jurisdiction where the requirements of 28 U.S.C. Sec. 1331 are met ("all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States"). Also, school board members are often sued in their individual as well as official capacities in order to overcome procedural obstacles. Cf. Wood v. Strickland, 93 S. Ct. 992 1001 (1975) (school board member not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected).

Kentucky Assoc. for Retarded Children v. Kentucky St. Bd. of Ed., C.A. No. 435, E.D. Ky., Consent Agreement, 11/12/74.

Action challenging Kentucky statutes and practices under which students with special needs were allegedly denied equal educational opportunity. The court approved a consent agreement providing in part as follows: (1) State defendants to pay attorneys' fees of $18,000 (for 600 uncompensated hours; this has been appealed); (2) The Commonwealth and each school system (as to students in that system) are responsible for providing for the education of all children "regardless of their physical, mental, emotional or learning conditions...such education or training that is suitable for [their] needs, capacities and capabilities." (3) Obligations as to blind and deaf children are not satisfied by providing services at statewide schools unless "there is a clear showing that [this is] the only suitable means for educating [these] child[ren]...." (4) Temporary exclusion from school (due to a temporary lack of a program) is permitted only after a due process hearing. (5) State defendants must provide for uniform enforcement of the consent agreement; establish a plan for continued supervision; direct that each district: (a) be in compliance with the agreement and controlling legal principles to receive state "minimum foundation grants," (b) establish procedures for identifying students with special needs and giving notice of the right to programs, (c) provide hearings on "educational opportunities" under the law for children for whom there is no existing local program and provide services in accord with parental choices; and (d) comply with state law. State defendants must also provide for appeal from hearings under (5) (c). (6) The court retained jurisdiction.

ELB

Mattie T. v. Johnston, C.A. No. DC-75-31-5, N.D.Miss. (Clearinghouse No. 15,299)

Class action, with local and statewide classes, on behalf of the handicapped children of Mississippi alleging that the defendant state and local school officials have failed to fulfill the federal statutory and constitutional duties created by The Education for the Handicapped Act, 20 U.S.C. 1411-1413; the Rehabilitation Act of 1973, 29 U.S.C. 794; the Elementary and Secondary Education Act, 20 U.S.C. 241e; the regulations issued by the Department of Health, Education and Welfare to implement Title I of the Elementary and Secondary Education Act of 1965, 45 C.F.R. §116.17(f); the Fourteenth Amendment; and 42 U.S.C. §1983. Plaintiffs allege that defendants have failed to: (a) provide any educational services to many handicapped children; (b) failed to provide adequate educational services to many other children; (c) failed to provide fundamental procedural safeguards in decisions involving the identification, evaluation and educational placement of handicapped children; and (d) employed racially discriminatory tests and evaluation procedures to identify and place children in special education classes. The relief requested involves identification and placement of handicapped children in appropriate programs as well as elaborate safeguards to insure that the state will comply with federal regulations.

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Rodriguez Distinguished in Right to Education Case

Colorado Association for Retarded Children v. Colorado, C.A. No. C-4620 (D. Colo., filed Dec. 22, 1972), motion to dismiss denied, July 13, 1973.

A three judge court has ruled that the Supreme Court's school finance decision in *San Antonio Independent School District v. Rodriquez*, 93 S.Ct. 1278 (1973), does not bar a suit to establish the constitutional right of handicapped children to receive a suitable free public education and has raised the possibility that classifications involving handicapped children may be ruled suspect.

The class action on behalf of all handicapped children in Colorado challenges statutes and regulations which result in regular enrollment for some children, special education for others, and exclusion from all public education of still others. Mandatory education for handicapped children is not required by statute until July 1, 1976, and plaintiffs allege that 60 percent of these children receive no education at present. These policies are alleged to violate equal protection, due process, and state constitutional requirements. Plaintiffs seek an order guaranteeing adequate, suitable education for all handicapped children and adequate notice and due process hearings for all classification decisions.

Following the Supreme Court's decision in *Rodriguez*, defendants filed a motion to dismiss, claiming that the right to education is not constitutionally protected. The three judge court denied the motion to dismiss and held that *Rodriguez* was distinguishable. The court noted the existence of several classifications and stated that a wealth classification, in which handicapped children in some districts receive a free education while children in other districts have only the option of private education, might also be involved. Further factual development was declared necessary in order to determine the possible existence of a suspect class requiring strict scrutiny or, alternatively, the possibility that Colorado's classification scheme must be struck down as arbitrary and unreasonable. Eventual findings on these issues were said to hinge in part upon a determination of the state's educational needs and existing programs. The denial of the motion was also based upon the need to determine plaintiff's due process claims concerning classification procedures.

This ruling may indicate the prematurity of fears that, in the wake of *Rodriguez*, the equal protection clause provides no effective leverage in the nation's schools except where racial or sexual discrimination exists. Several possible routes left open by *Rodriguez* are implicit. First, the issue of suspect classification may be raised. (Demonstrating the existence of a suspect classification is one way to trigger strict judicial scrutiny, requiring a compelling state interest, under the equal protection clause; demonstrating the existence of a fundamental right or interest is the other.) In noting the possible existence of a suspect class, the three judge court cited the *Rodriguez* criterion for suspect classification: a group which is

> . . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 93 S.Ct. at 1294.

(For a summary of the arguments that this special protection should be afforded to children placed in low tracks or to *all* children, as well as to handicapped children, see "School Classification: Some Legal Approaches to Labels," by Merle McClung, 14 *Inequality in Education* 17, 28.)

As noted above, even the possibility of a suspect wealth classification can be raised within certain educational contexts. The *Rodriguez* determination that there was no suspect wealth classification rested on findings that the Texas financing scheme did not discriminate "against any definable category of 'poor' people or result in the absolute deprivation of education." 93 S.Ct. at 1292.

Second, as indicated by the ruling, *Rodriguez* does not necessarily foreclose all attempts to claim a constitutional right to education. The *Rodriguez* holding that students in Texas had not been deprived of any fundamental rights was based on the court's finding that there was no failure "to provide each child with the opportunity to acquire the

basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process." 93 S.Ct. at 1299. While this standard is most obviously applicable to total exclusion from public education, it might also be argued where, as with some of the children in Colorado, the education provided is unsuitable for teaching the child those basic skills, particularly where it is so inappropriate or inadequate that it is tantamount to an absolute denial of educational opportunity.

Third, the Colorado court's openness to the possibility that the classification scheme may be unreasonable even in the absence of strict scrutiny may indicate increasing judicial movement toward a more flexible approach to equal protection issues in which the scope of review is tied to a continuum of the importance of the interests affected. (See McClung, *supra*, at 29.) The crucial importance of education and equal educational opportunity, noted in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and reaffirmed in *Rodriguez*, 93 S.Ct. at 1295, provides material for arguing that a finding that education is not fundamental interest should not relegate educational issues (at least outside of school finance) to the extremely limited treatment traditionally associated with "restrained review."

[For a summary and discussion of *Rodriguez*, see the case note by Thomas Flygare, 14 *Inequality in Education* 51.]

From 15 Inequality in Education at 88

COURT REJECTS MOTION TO DISMISS FOR MOOTNESS IN HANDICAPPED EXCLUSION CASE

Colorado Association for Retarded Children v. *Colorado*, C.A. No. C-4620 (D. Colo., filed Dec. 22, 1974), motion to dismiss for mootness denied June 14, 1974.

[A summary of the complaint and an earlier ruling refusing to dismiss for failure to state a claim appears in 15 *Inequality in Education* 88.]

Plaintiffs are handicapped children who have been excluded from school or are threatened with exclusion. In this statewide class action, they allege Fourteenth Amendment violations, and seek access to free public education and procedural safeguards. Defendants moved to dismiss for mootness based upon an amendment to Colorado law which advanced the deadline for local systems to implement plans for educating all handicapped students from July 1, 1976 to July 1, 1975.

The three-judge court rejected the mootness claim for two reasons. First, it noted that the legislature had previously established deadlines which were not fulfilled or which were delayed:

> In the light of the irregular and delayed implementation of legislation in the essential area of education for handicapped children, we are of the view that this case is not moot. The mere enactment of legislation without actual implementation does not render substantial legal questions moot.

Second, the court relied upon "plaintiffs' claims for compensatory relief for past exclusions of handicapped children from school programs." Thus, plaintiffs sought "relief beyond that mandated in the [state law]."

For related cases, see *Harrison* v. *Michigan*, 350 F. Supp. 846 (E.D. Mich., 1972) (case moot), and *Panitch* v. *Wisconsin*, C.A. No. 72-C-461 (E.D. Wis., Feb. 19, 1974) (rejecting mootness claim).

From 18 Inequality in Education at 54

Note: Developments in these and other cases are reported in the Education Law Bulletin and in "A Continuing Summary of Pending and Completed Litigation Regarding The Education of Handicapped Children," the latter available from The Council for Exceptional Children, 1920 Association Drive, Reston, VA 22091.

II. Exclusion of "Normal" Children

II.AA. SEX DISCRIMINATION

II.A A.1. Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 prohibits descrimination in federally assisted education programs against students and employees on the basis of sex. The key provision of Title IX reads,

> . . . No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Education Amendments of 1972, Sec. 901(a), 20 U.S.C. 1681(a) (1974).

The statute is silent on how an individual may initiate a complaint, standards for enforcement by DHEW, and details on what constitutes discrimination. In many respects it resembles Title VI of the Civil Rights Act, 42 U.S.C. 2000d (1974) which comprehensively bans discrimination on account of race, color or national origin in all federally-assisted programs. The experience under the latter has shown the DHEW--the only federal agency to attempt wide scale enforcement in grant programs--moves only very slowly in its determination to withhold funds, and more often merely threatens to do so. Thus, individuals seeking speedy relief will still be better off filing an action in federal or state court alleging a denial of equal protection.

There are some specific exceptions and exemptions in the law. First, bans on admissions bias apply only to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ." 20 U.S.C. 1861(a)(1). Second, an institution controlled by a religious organization is exempt to the extent that the application of the anti-discrimination provisions is not consistent with the religious tenets of the organization. 20 U.S.C. 1681(a)(3). Discrimination in such institutions on the basis of sex for reasons of custom, convenience or administrative rule presumably is prohibited. Third, a military school is also exempt if its primary purpose is to train individuals for the military services of the United States or the merchant marines. 20 U.S.C. 1681(a)(4).

The statute specifically does not require sex quotas, but authorizes statistical evidence as proof of bias. 20 U.S.C. 1681(b).

The regulations under Title IX are comprehensive and far-reaching. See Fed. Reg. 24127 et seq. (June 4, 1975) (effective date, July 21, 1975) (to be codified as 45 C.F.R. 86.1 et seq.) These regulations make it clear that sexual discrimination in any part of a federal program, not just those directly receiving federal assistance, disqualify the agency as a recipient, (secs. 86.11 & 86.31(a)),even if the discrimination takes place in a separate, but closely related, agency (one which receives substantial assistance from the recipient agency). Sec. 86.31(b)(7). The regulations contain specific rules for scholarships and other financial assistance, sec. 86.37, employment assistance, sec. 86.38, recruitment, sec. 86.23, admissions, secs. 86.21, 86.15(d), (e), coverage to all related activities, including "health, physical education, industrial, business, vocational, technical, home economics, music and adult education courses," sec. 86.34 access to courses such as home economics or shop, sec. 86.34 (except sex education or physical education courses may be separated), access to vocational and other schools, sec. 86.35, employ-

ment of students, sec. 86.38, counseling, sec. 86.36, and health and insurance services, secs. 86.39 and 86.56(b). Accommodations for men and women must be comparable in housing, sec. 86.32(b) (although there may be sex segregation in the housing and other facilities (sec. 86.33) (although toilets and the like may be segregated). A section on athletic participation promises general equality, but permits separate teams for competitive skill and contact sports. In competitive, non-contact sports, however, one sex must be permitted access to the team of another sex if none other is available. Sec. 86.41. Discrimination on account of marital or parental status is barred. Secs. 86.57, 86.21(c). Some general provisions bar sex discrimination in allocation of benefits generally, including academic and research opportunities. Sec. 86.31. Rules for appearance, sec. 86.31(b) (5) and tuition 86.31(b) (6) must be uniform.

II.A A.2. Amendments to the Public Health Service Act Prohibiting Sex Discrimination

Another earlier federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA), were amended to prohibit sex discrimination in admissions to federally funded health training programs. Public Health Service Act, 42 U.S.C. secs. 295h-9 and sec. 298b-2 (1974). Implementing regulations for the PHSA became final August 6, 1975. 40 Fed. Reg. 28572 (July 7, 1975) (to be codified as 45 C.F.R. 83.1 et seq.) The main objective of the PHSA regulations is to eliminate sex discrimination in all health training programs operated by an entity which receives support under Title VII or Title VIII of the PHSA and thereby ensure that maximally qualified health personnel are trained.

From pages 169-70 of The Constitutional Rights of Students: Analysis and Litigation Materials for the Student's Lawyer (March 1976). This publication, available from the Center for Law and Education, includes a section on "Constitutional Amendment and State Rights to be Free of Discrimination" and cases involving sex discrimination.

Sex Discrimination in Admission to Academic High School Held Unconstitutional; Racial and Economic Discrimination Not Substantiated

6583. Berkelman v. San Francisco Unified School District. No. 73-1686 (9th Cir., July 1, 1974). Appellants represented by Susanne Martinez, Kenneth Hecht, Youth Law Center, 795 Turk St., San Francisco, Cal. 94102, (415) 474-5865. [Here reported: 6583I Opinion (12pp.). Previously reported at 6 CLEARINGHOUSE REV. 682 (March 1973).]

This action challenged the method of selection of students for an elite, academic public high school on the grounds that the admissions policy of the school district—based upon prior grade point averages—discriminated on its face against female students and in operation against minority students and low-income students. The decision of the district court, finding no unlawful discrimination in the admission standards, was reversed in part and affirmed in part by the Ninth Circuit.

The Ninth Circuit held that the utilization of different—and more stringent—admission requirements for female students violated the fourteenth amendment. The court applied a 'strict rationality' standard of review regarding sex discrimination, a standard of review which the court said required the government to produce evidence that the challenged classification furthered the central purpose of the classifier. The school district had claimed that the different admission standards were necessary to keep the number of female students to half of the school population. The Ninth Circuit held that in the absence of any evidence showing that an equal number of male and female students furthers the goal of better academic education, the discriminatory standards were unconstitutional.

With respect to the racial and economic discrimination alleged, the court found that there was no substantial evidence of intentional or overt discrimination in selection of the students. Since the 'neutral' admission standards, however, operated in fact to exclude a disproportionate number of black and Spanish-speaking students, the court held that its duty was to examine the standard to determine whether the admissions standard substantially furthers the purpose of providing the best education possible for students in the district. Conditioning admission on the basis of past academic achievement, the court found, substantially furthers the district's articulated purpose of operating an academic high school. The court noted that unlike a 'tracking system' in which the challenged classifications are 'predictive' and isolate students of 'less promising' ability, the classification was based upon past achievement impartially measured.

With respect to the under-representation of low-income families, the court held that low-income persons have no greater status under the equal protection clause than members of racial minorities and since the admissions policy was not made unconstitutional by its impact upon black students, it is likewise not made unconstitutional by a similar impact upon low-income students.

CR

Note: Berkelman v. San Francisco Unified School District is now reported at 501 F.2d 1264 (9 Cir. 1974). See also Bray v. Lee, 337 F.Supp. 934 (D.Mass. 1972), holding that there is a violation of the equal protection clause where girls have to score higher to get accepted into special academic high school than boys because Boston Boys Latin School has 3000 spaces and Boston Girls Latin School has only 1500 spaces; Vorchheimer v. School District of Philadelphia, 44 L.W. 2474 (3 Cir. 3/16/76), holding that public school district's maintenance, in otherwise co-educational system, of two single sex high schools in which enrollment is voluntary and educational opportunities offered to males and females are essentially equal violates neither the Equal Educational Opportunities Act of 1974 nor the equal protection clause.

See generally tracking, Part V infra; and articles by S. Martinez, P. Weckstein, M. Dunkle and B. Sandler in "Sex Discrimination" Issue, Number 20 Inequality in Education (October 1974).

Cartoon by David Sipress

II.A. Pregnancy and Motherhood

Regina J. v. English, C.A. No. 75-616, D.S.C. (Clearinghouse #15,303)

Action on behalf of fourteen-year-old public school student challenging her "exclusion from attendance in the public schools...solely because she is an unwed mother." Plaintiff is enrolled in the night program which is alleged to be inferior and/or less desirable in terms of course offerings, extra-curricular activities, counseling and costs. It is alleged that plaintiff's exclusion violates her right to due process and equal protection; her rights under Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) which prohibits sex discrimination in programs receiving federal financial assistance (there is no comparable policy for unwed fathers); and her rights under Article XI, Section 3 of the South Carolina Constitution which provides for a system of free public education open to all children in the state.

ELB

Andrews v. Drew Municipal Separate Sch. Dist., 507 F.2d 611 (C.A. 5, 1975)

Action by unwed mothers challenging rule against employing unwed parents. One plaintiff was a teacher's aid when the rule was adopted, and the other an unsuccessful applicant for the same position.

Rulings: (1) Contention that unwed parenthood was conclusive proof of immorality denied due process of law by creating "irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." (614-16) (2) Given other reasons advanced for rule, it denied equal protection of the laws even when measured by the "traditional" standard of review (616-17), and the court need not reach, therefore, the district court's alternative finding of a sex-based classification or its conclusion that such classifications are suspect.

ELB

Houston v. Prosser, 361 F.Supp. 295 (N.D. Ga. 1973)

The court found the school board policy of excluding an unwed mother from the day school fair and valid on its face, because the plaintiff had the opportunity to attend night school; but held it to be a violation of the equal protection clause, as applied, because there was a tuition charge for the evening session. Analogies may be drawn between the school's policy of excluding pregnant students and similar policies toward pregnant teachers. Cf. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (right to be free from unwarranted governmental intrusion into matters so fundamental as the decision to bear a child). But see Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975) (upholding the exclusion of students with children from college dormitory).

II.B. Marriage

Indiana High School Athletic Association v. Raike, No. 2-273-A-38, Court of Appeals of Indiana, 2d Dist., Opinion, 5/12/75 (Clearinghouse Review #15,758)

Action seeking to prohibit the enforcement of rules of the state athletic association and the local school board which prohibit married students from participating in high school athletic and extra-curricular programs. Rulings: (on appeal from a trial court ruling for the student) (1) In addition to the "rational basis" and "compelling state interest" standards of equal protection analysis, recent cases posit an intermediate standard, i.e., a classification "must rest upon ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (Emphasis supplied)." Quoting Village of Belle Terre v. Boraas, 94 S.Ct. 1536 (1974) (Slip Op., p. 10) Finding "the right to marry ... not conclusively recognized as a fundamental right", the court applies the intermediate standard of review. (12-19) (2) The "objective of the rules is to preserve the integrity and wholesome atmosphere of amateur high school athletics...." (17) The classification "is over-inclusive in that it includes some married students of good moral character...." It is "under-inclusive" in excluding unmarried participants in athletics who engage in premarital sex, or "may be of a depraved nature." Therefore, "those similarly situated are not similarly treated, and therefore there is no fair and substantial relation between the classification and the objective sought." (18-19) (3) It is "possible" to conclude that the rule does not satisfy the rational basis standard. (19-20) (4) The court decides the case although plaintiff has graduated because "the issue is one of substantial public interest...." (7,n.3) (5) Any requirement that administrative remedies be exhausted was satisfied where plaintiff by letter requested the superintendent to change the rule and was informed no change would be made. (31)

Note : The decision collects the cases on married students, noting a trend toward rulings favoring students. (21-22)

EI.B

This case is now reported at 329 N.E. 2d 66.

Other recent cases include Hollon v. Mathis Ind. Sch. Dist., 358 F.Supp. 1269 (S.D. Tex. 1973), vacated for mootness, 491 F.2d 92 (5th Cir. 1974) (granting a temporary restraining order to prohibit male married student's exclusion from interscholastic league athletics activity); Charron v. Board of Sch. Dir. of Sch. Admin. Dist. No. 6, Civil No. 12 (Temporary restraining order)(S.D. Me. Oct. 7, 1970); O'Neill v. Dent, 364 F.Supp. 565 (E.D.N.Y. 1973) (striking down statute prohibiting attendance by married cadets

at the U.S. Merchant Marine Academy). Also see Bell v. Lone Oak Ind. Sch. Dist., 507 S.W. 2d 636 (Tex. App. Ct. 1974) (majority opinion) (Cornelius, J. concurring at 639) (There is no relation between marital status and athletic participation), dismissed in part as moot, 515 S.W. 2d 252 (Tex. Sup. Ct. 1975).

Romans v. Crenshaw, 354 F. Supp. 868, 870 (S.D. Tex. 1972) (exclusion from nonathletic extracurricular activities because of marital status unconstitutional). The court observed:

> A rule that would punish the necessary legitimization of an offspring (by getting married) would in its purblind application effectively reward the bastardizing of the offspring.

But cf. Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975) (rejecting a claim based on right to marital privacy and right to raise children as grounds for striking down a university provision excluding children from married students housing) and Parish v. National Collegiate Athl. Ass'n, 506 F.2d 1028 (5th Cir. 1975) (rule barring athletes who do not earn minimum grade point average found to have rational basis).

II.D. "The Problem of the Due Process Exclusion"

A substantially revised version of this article, titled "The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?" appeared in 3 Journal of Law and Education 491 (October 1974). The major addition was a section on policy considerations (pages 515-27) with discussion of (1) the possibility that the school rather than the child is the problem, (2) the least restrictive educational alternative, and (3) possible stigma, separation and behavior control consequences of arguing that children with behavior problems should be treated like other children with special needs.

Another section of this article (pages 512-15) considers whether various state statutory definitions of exceptional children, carrying with them the mandate for education rather than exclusion, include children expelled from school because of behavior problems. (Compare with new Iowa, Pennsylvania, Connecticut and California laws summarized at II.G. - II.I. infra.) Definitions of "handicapped children" in federal legislation often seem designed to preclude this possibility, but note the following comment and response from regulations published in 41 Federal Register 8604 (February 27, 1976):

> SUMMARY OF COMMENTS AND RESPONSES
>
> 1. Section 121a.10 *Special provisions and descriptions.*
>
> *Comment.* While no specific comments were received on the new proposed paragraph (g) which set forth the statutory requirements in section 613(b)(1) of the Education of the Handicapped Act (added by Public Law 93-380), a commenter did recommend that "all handicapped children in need of special education and related services" be defined to include all mentally retarded and exceptional, or thought to be exceptional, children under 21 years of age, including institutionalized children, those suspended or expelled from school, and those who are chronically truant more than 25 percent of the time.
>
> *Response.* No change has been made. Such children are deemed by the Department to be handicapped children within the meaning of the definition of "handicapped children" set forth in section 602(1) of the EHA. Further, "special education" and "related services" are defined in amendments to Section 602 (Sections 602(16) and (17)) contained in Public Law 94-142. These children are eligible to receive services under either Part B or section 121 of the Elementary and Secondary Education Act of 1965, as amended (programs for handicapped children in State-operated and State-supported schools), depending on which agency in the State is directly responsible for their free public education.

II.E.2. *Dunlap v. Charlotte-Mecklenburg Bd. of Educ.*

THREE JUDGE COURT ABSTAINS ON DUE PROCESS EXCLUSION ISSUE

As reported in *Inequality in Education*, #15, *Dunlap* v. *Charlotte Mechlenburg Bd. of Educ.*, C.A. No. 72-72 (W.D.N.C., filed 4/17/72), consolidated with *Webster* v. *Perry*, C.A. No. C-138-WS-72 (M.D.N.C., filed 5/10/72) for purposes of appeal, is one of the few cases directly challenging the power of a school board to expel students for disciplinary reasons. Plaintiffs are black students who argue that their exclusion from public education violates the Fourteenth Amendment and the North Carolina Constitution. Plaintiffs do not contest the charges against them or allege procedural defects in the hearings provided by the school, but argue instead that the exclusion statute is disproportionately applied to blacks, and also that the school's objectives can be satisfied by transfer of "problem students" from regular classes to alternative educational programs.

In a decision filed on December 3, 1973, the court retained jurisdiction over, but abstained from deciding, whether the North Carolina exclusion statute (N.C.G.S. sec. 115-147) violates the U.S. Constitution because it allegedly (a) is vague and overbroad and (b) denies equal protection of the laws by classifying some students as not being entitled to a public education. The majority opinion conceded that these allegations "raise issues normally appropriate for determination by a three judge district court," but abstained on these questions because "it appears clearly that the plaintiffs in each case have both a substantial statutory and constitutional claim under North Carolina law." The majority emphasized the N.C.G.S. sec. 115-1 and N.C. Constitution Art. IX, sec. 2(1) both provide for free public schools "wherein equal opportunities shall be provided to *all* students," and the state court might interpret these provisions in a way that would avoid or modify any federal constitutional questions.

While similar statutory and constitutional provisions exist in most states and could easily be interpreted to preclude a school from expelling a student totally from public education for misconduct, courts traditionally have not read such provisions as a bar to exclusion. Usually court review of disciplinary exclusions (except where personal rights of constitutional dimensions like free speech are involved) is limited to (a narrowly defined) "irrationality" or "arbitrariness" and assurance that procedural due process was afforded.

In a dissenting opinion, J. McMillan noted procedural obstacles to a state court remedy, and concluded that the three judge court should have decided the difficult constitutional questions because, *inter alia*, the plaintiffs were indigent, black and effectively excluded from public education. J. McMillan also noted: "So few whites have been similarly excluded from school during the relevant period that a strong inference arises that the exclusion statute has been used and may be used discriminatorily against black students." He concurred, however, with the majority decision to remand the issue of racially discriminatory application of N.C.G.S. 115-147 to single federal district judges.

16 Inequality in Education at 60

II.G. *Fox v. Benton*

C.A. No. 74-5-D (S.D. Ia., filed February 8, 1974): Complaint

This case is based primarily on the argument that children expelled from school because of various behavior problems must be treated like other children with special needs -- i.e., provided with special or alternative education suited to their needs rather than totally excluded from public education. Since special or alternative education involves the possibility of stigma, separation from other students and behavior-control techniques as mentioned in Part II.D. supra, the parents/child should be informed of, and willing to accept, these possibilities before pursuing this legal approach. Some potential clients will prefer total exclusion to this approach -- which is why the class of plaintiffs in Fox v. Benton is limited in Paragraph 11 of the Complaint to all children who have been "involuntarily excluded" from school because of various behavior problems.

The following are excerpts from the Amended Complaint in Fox v. Benton:

INTRODUCTION

1. This is an action for declaratory and injunctive relief to redress the deprivation of rights secured to the plaintiffs under the Constitution and laws of the United States, including the Eighth and Fourteenth Amendments to the Constitution; and Title 42 U.S.C. Section 1983 which provides redress for the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution and laws of the United States. This action includes a constitutional, equal protection challenge to Sections 282.3 and 282.4 Code of Iowa 1973, which authorize the exclusion of some handicapped children from public education while other handicapped children are provided special education pursuant to Chapter 281, Code of Iowa 1973, and children without

handicaps are provided with public education.

* * * *

[Sections on Jurisdiction and Parties omitted.]

* * * *

CLASS ACTION - PLAINTIFFS

11. Named plaintiffs sue on their own behalf and, pursuant to Rule 23, Federal Rules of Civil Procedure, on behalf of all other Iowa residents of school age who are eligible for a free public school education and who have been or may be involuntarily excluded from, or otherwise deprived of, access to a normal public education by virtue of their classification as 'hyperactive', 'behavior problems', 'emotionally maladjusted', 'incorrigible', 'immoral', 'disruptive', abnormal', 'immature' or any other kind of non-conforming behavior which is or should be recognized as a handicap. All plaintiffs can profit from an education whether in regular classrooms with supportive services or in special classes adapted to their needs. The class is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class. The claims or defenses of the representative parties are typical of the claims or defenses of the class. The representative parties will fairly and adequately protect the interests of the class. In addition, prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the local officials opposing the class. Prosecution of separate actions by individual members of the class would, in addition, create a risk of adjudications, with respect to individual members of the class, which would as a practical matter be dispositive of the interests of other members not parties to the adjudication and would substantially impair and impede their ability to protect their interests.

12. Defendants have acted and failed to act on grounds generally applicable to the class, thereby making appropriate preliminary and final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

* * * *

[Sections on Class Action Defendants and Factual Allegations omitted.]

* * * *

CLAIMS FOR RELIEF

17. As their claim for relief plaintiffs allege that the actions of defendants pursuant to Sections 282.3 and 282.4 Code of Iowa 1973 are depriving them of their right to an education secured to them by the Fourteenth Amendment to the United States Constitution; and that in addition the actions of defendants pursuant to said statutes constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

18. Plaintiffs are and will continue to suffer irreparable harm and injury at the actions of defendants, including, but not limited to the following:

a. Disruption and impairment of their personal, social and peer group development.

b. Emotional anguish resulting from ridicule, rejection, loneliness and insecurity.

c. Continuing and irreversible harm to their futures as students, wage-earners, citizens and members of society.

d. Loss of normal educational progress toward careers and toward advanced educational goals.

e. Deterioration of proper relations with authority.

f. Increased loss of interest in and frustration with school and academic matters.

g. Development of emotional and behavioral signs of disorientation and boredom.

h. Increased likelihood of becoming part of a "self-fulfilling prophecy", propelling him toward academic, social and economic failure.

19. Plaintiffs have no adequate, plain and speedy remedy at law to redress such injuries and therefore bring this suit for declaratory and injunctive relief as their only means of securing such relief.

20. As an additional claim for relief, plaintiffs allege that the persistent refusal by defendants to provide a suitable education for them has resulted in harassment of them by juvenile probation authorities because of their appearance as truants, resulting in the initiation and the stigma of a juvenile record against one of them.

WHEREFORE, plaintiffs pray that this Court:

1. Convene a Three Judge Court pursuant to Sections 2281 and 2284 of Title 28 U.S.C.

2. Enter an Order declaring that Sections 282.3 and 282.4 Code of Iowa 1973, are in violation of plaintiffs' constitutional rights in that defendants' policies, actions and practices pursuant to such statutes, which exclude plaintiffs from a regular public school assignment without providing an immediate educational alternative, denies them the equal protection of the laws.

3. Enter an Order declaring that providing special education to some behaviorally handicapped children pursuant to Section 281.2(2) Code of Iowa 1973, and denying such special education to

other behaviorally handicapped children pursuant to Section 282.3 and 282.4 Code of Iowa 1973, constitutes violation of equal protection under the Fourteenth Amendment.

4. Enter an Order declaring that the provision of special education to handicapped children under Section 281.2(1) Code of Iowa 1973, and denying special education to behaviorally handicapped children pursuant to Sections 282.3 and 282.4 Code of Iowa 1973, constitutes a denial of equal protection of the laws under the Fourteenth Amendment.

5. Enter an Order declaring that Sections 282.3 and 282.4 Code of Iowa 1973 are in violation of plaintiffs' constitutional rights in that defendants' policies, actions and practices pursuant to such statutes, which exclude plaintiffs from a regular public school assignment without providing an immediate educational alternative constitutes cruel and unusual punishment.

6. Enter an Order declaring that Sections 282.3 and 282.4 Code of Iowa 1973 are in violation of plaintiffs' constitutional rights in that defendants' policies, actions and practices pursuant to such statutes, allowing expulsion from a regular public school program without a due process hearing, violate the due process clause of the Fourteenth Amendment.

7. Permanently enjoin defendants, their agents, representatives and employees from the use of suspension as a disciplinary measure which discriminates against plaintiffs as handicapped children in violation of the Fourteenth Amendment.

8. Permanently enjoin defendants, their agents, representatives and employees from the use of any suspension or expulsion

procedures against plaintiffs, which do not comply with full due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

9. Permanently enjoin the defendants, their agents, representatives and employees from expelling plaintiffs from a regular public school educational program without provision for an immediate educational alternative comparable to that provided to children certified under Section 281.2(2) Code of Iowa 1973.

10. Permanently enjoin defendants, their agents, representatives and employees from exercising any authority or power under Sections 282.3 and 282.4 Code of Iowa 1973.

11. Permanently enjoin defendants, their representatives, agents and employees from any classification resulting in the assignment to or the denial of alternative educational programs without a hearing which complies with full due process of law.

12. Order that the defendants provide tutoring, or other compensatory education, to compensate plaintiffs for educational opportunities lost due to defendants' unconstitutional exclusion of plaintiffs.

13. Order that the defendants submit, within fourteen days of the entry of its Order, a report to this Court and counsel for plaintiffs, which shall list each child presently suspended, expelled, or otherwise excluded from a publicly-supported education, the reason for, and the date and length of, each such suspension, expulsion, or exclusion and the proposed time and type of educational placement of each such child.

14. Order that the defendants notify, within forty-eight hours of the submission of said report, the parents or guardian of

each such child, and inform each as to the child's right to a publicly-supported education and as to that child's proposed educational placement.

15. Order that the defendants cause to be publicly announced within twenty days of the entry of its Order, to all parents in the State of Iowa that all children, regardless of behavior disorder or any other kind of non-conforming behavior or behavior handicap, have a right to an education; and to inform such parents of the procedures required to enroll their children in an appropriate program; and to submit a plan to this Court and counsel for the plaintiffs for future periodic announcements.

16. Order that defendants provide restitution to each parent or guardian of members of the plaintiff class for cost of education paid or committed by said parent or guardian as a result of the illegal exclusion.

17. Award to the plaintiffs compensatory damages for their severe mental anguish, emotional distress and psychological detriment, suffered as a direct result of the actions of the defendants.

18. Order that defendants pay and reimburse plaintiffs for the costs of this action and for reasonable attorney fees.

19. Order such other and further appropriate relief as the Court may deem proper.

Respectfully submitted,

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Note: On May 28, 1974 the Iowa State Legislature adopted a new special education bill (Senate File 1163, 65th General Assembly) which amended Section 281.2 to include "chronically disruptive" children among those children requiring special education. Effective July 1, 1975, Section 281.2 now provides, inter alia:

> "Children requiring special education" means persons under twenty-one years of age, including children under five years of age, who are handicapped in obtaining an education because of physical, mental, emotional, communication or learning disabilities or who are chronically disruptive, as defined by the rules of the department of public instruction.
>
> * * * *
>
> It is the policy of this state to provide and to require school districts to make provision, as an integral part of public education, for special education opportunities sufficient to meet the needs and maximize the capabilities of children requiring special education. . . . To the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. . . . Special classes, separate schooling or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the educational handicap is such that education in regular classes even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

The Legislature did not, however, strike from the Iowa statutes Sections 282.3 and 282.4 which authorize the expulsion of some school children.

II.H. Other Cases Challenging Disciplinary Exclusion

Student Expelled From Attending Any School in District Alleges School Board Has Responsibility of Making Some Provision for His Education

16,959. Howard H. v. Wentzel, No. 41 (Pa. C.P., Cumberland County, filed 1975) Plaintiff represented by Irene Solet, Stephen Miller, Education Law Center, Inc., 2100 Lewis Tower Bldg., 225 S. 15th St., Philadelphia, Pa. 19102, (215) 732-6655. [Here reported: 16,959A Complaint (6pp.); 16,959B Petition (2pp.); 16,959C Supplemental Memo (18pp.).]

Plaintiff seeks a petition for special injunction against the West Shore School District in which last March and formally expelled the plaintiff from attending any school in the district. Plaintiff contends that since the West Shore School Board has refused to offer any educational services, the board is acting in defiance of a regulation adopted by the State Board of Education in 1974 which provides that students who are less than 17 years of age are still subject to the compulsory school attendance law even though expelled, and must attend school. The responsibility for placing the student in school rests initially with the student's parents or guardian. However, if the student is unable to attend another public school, cannot afford to attend, or is unable to be accepted at a private school, the student's school district has the responsibility to make some provision for the child's education, either through instruction in the home or by readmitting the child. If none of these alternatives is acceptable, the school district must take action in accordance with the provisions of the Juvenile Act (11 P.S. §50-101, *et seq.*) to ensure that the child will receive a proper education. 22 Pa. Code §12.6(h).

CR

School District's Policy of Not Providing Alternative Instruction to Insubordinate Students Suspended for Five Days or Less Violates New York Education Law

16,818. Turner v. Kowalski, No. 2001E (N.Y. Sup. Ct., App. Div., Oct. 28, 1975). Appellant represented by Catherine Cronin, Andrew Levy, Legal Aid Society of Westchester County, 56 Grand St., White Plains, N.Y. 10601, (914) 761-9200. [Here reported: 16,818A Verified Petition (7pp.); 16,818B Answer (8pp.); 16,818C Judgment (2pp.); 16,818D Appellant's Brief (80pp.); 16,818E Respondents' Brief (22pp.); 16,818F Opinion and Order (4pp.).]

The Appellate Division of the New York Supreme Court modified the trial court judgment which held that the action was brought as a proper class action but that school authorities did not have to provide alternative instruction for a student suspended for unruliness where the suspension is for five days or less pursuant to Section 3214 of the Education Law. The Appellate Division declared that the policy of not providing alternative instruction was in clear violation of that section, which states that "immediate steps shall be taken for his attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to the provisions . . . of the family court act."

CR

Freeman v. Brooks, No. A-5104, Chancery Court for Davidson County, Tennessee (Clearinghouse Review # 14, 808 A)

Class action alleging that plaintiff, a fifteen year old "handicapped" student with a history of problems adjusting to the school environment, was unlawfully excluded from school in violation of Tennessee's Mandatory Education Act. (T.C.A. 49-2912 et seq.) and the procedural due process requirements of the Tennessee and United States Constitutions. In addition to local officials, the defendants include the State Commissioner of Education who allegedly has the "responsibility to see that educational services are provided for all handicapped children." The court is asked to enjoin the defendants from excluding handicapped students from programs appropriate to their needs, suspending pupils from school without at least an informal hearing, after oral or written notice of charges, which conforms to the dictates of constitutional due process requirements and Tennessee law.

ELB

Note: See also Mitchell v. King (Connecticut Law Journal, July 15, 1975), discussed at II.I. infra.

II.I. Disciplinary Exclusion: The New Connecticut Law

On July 8, 1975, the Governor of Connecticut signed into law Public Act No. 75–609, titled "An Act Concerning Exclusion from School for Disciplinary Purposes." The new law provides procedural safeguards prior to suspension, expulsion, and disciplinary transfer from school. Probably more significant are the substantive provisions which guarantee (1) an opportunity to complete any classwork and examinations the student missed during a suspension period, and (2) an alternative educational opportunity for an expelled student during an expulsion period, with no expulsion period to extend beyond the end of the school year.

The new Connecticut law replaces an old statute authorizing expulsion for "conduct inimical to the best interests of the school." As discussed below, the Connecticut Supreme Court subsequently held this old law, similar to many existing state exclusion statutes, too vague to constitute a valid delegation of power by the legislature. This note will summarize the major provisions of the new Connecticut exclusion law, and comment briefly on this law and exclusion legislation in general.

Major Provisions

Removal from class, suspension, and expulsion are each treated differently by the new Connecticut law. The due process required prior to expulsion is extended to students who have been recommended for disciplinary transfers to another school. Under Section 2 the new law, the board of education may authorize teachers to *remove* a student from class for a period of up to ninety minutes and send him/her to a designated area when he/she "deliberately causes a serious disruption of the educational process within the classroom, provided no pupil shall be removed from class more than six times in any year nor more than twice in one week" unless given the kind of informal hearing described for suspension below.

Under Sections 3 and 4 of P.A. No. 75–609, the board of education may also authorize school officials to *suspend* or *expel* "any pupil whose conduct endangers persons or property or is seriously disruptive of the educational process, or which conduct is violative of a publicized policy of such board." Each board of education is required by Section 5 of the new law to assure that all pupils within its jurisdiction are informed, at least annually, of the board policies governing student conduct. And each board of education is further required by Section 5 to provide an effective means of notifying, within twenty-four hours, the parents or guardian of any minor pupil who has been removed from class, suspended from school, or who is being recommended for expulsion or disciplinary transfer. Other provisions of the new law dealing with suspension and expulsion are described below.

Suspension

Section 1(c) of P.A. No. 75–609 defines suspension as "an exclusion from school privileges for no more than ten consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which such suspension was imposed." Section 3 also states that "Unless an emergency exists, no pupil shall be suspended without an informal hearing before the building principal or his designee at which such student shall be informed of the reasons for the disciplinary action and given an opportunity to explain the situation." A student may be suspended before a hearing if an emergency exists. "Emergency" is defined in Section 1(e) as "a situation under which the continued presence of the pupil in school poses such a danger to persons or property or such a disruption of the educational process that a hearing may be delayed until a time as soon after the exclusion of such pupil as possible."

Section 3 of the new Connecticut law indicates that a more formal hearing may be held if the circumstances surrounding the incident so require. It also provides that "no pupil shall be

suspended more than ten times or a total of fifty days in one school year, whichever results in fewer days of exclusion," unless the student is granted the kind of formal hearing described below for expulsion. The Connecticut law further provides: "Any pupil who is suspended shall be given an opportunity to complete any classwork including, but not limited to, examinations which such pupil missed during the period of his suspension."

Expulsion

Expulsion is defined in Section 1(d) as an exclusion from school privileges for more than ten consecutive school days, but it cannot extend beyond the end of the school year. These provisions regarding expulsion also apply to transfer to another school for disciplinary reasons. Section 4 of the law states that unless an emergency exists, "no pupil shall be expelled without a formal hearing held pursuant to sections 4–177 to 4–180, inclusive of the general statutes." If an emergency exists, as defined above, the hearing may be held after the student is excluded from school, but must be held as soon thereafter as possible.

The requirements of a hearing pursuant to Section 4–177 to 4–180, the standard state hearing procedures in Connecticut's Administrative Procedures Act, are set forth below. First, all parties must have reasonable notice. In the case of a minor notice must also be given to the parents or guardians of the pupil.

Section 4–177

(b) The notice shall include: (1) A statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and regulations involved; (4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include: (1) All pleadings, motions, and intermediate rulings; (2) evidence received or considered; (3) questions and offers of proof, objections and rulings thereon; (4) any decision, opinion or report by the officer presiding at the hearing.

(f) Oral proceedings or any part thereof shall be transcribed on request of any party. The requesting party shall pay accordingly, the cost of such transcript or part thereof.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noted.

Section 4–178 provides, in part, that oral and documentary evidence may be received, and a party may conduct cross examination. And Section 4–180 provides that a final decision against the student must be in writing or stated in the records. The student or his parents or guardians must be notified in person or by mail of any decision or order, and are entitled to a copy of the decision or order for themselves and their attorney.

Alternative Education for Expelled Students

Section 4(c) of the new Connecticut law provides that "any pupil who is expelled shall be offered an alternative educational opportunity during the period of expulsion." However, if for any reason the parent or guardian of the student does not want to have him/her enrolled in an alternative program, the parent can choose total exclusion from school for his/her child for the expulsion period and not be subject to the usual penalties for not complying with the compulsory education law (Section 10–184).

Commentary

The provision for alternative education during the expulsion period is especially noteworthy because it reflects an educational philosophy that the due process exclusion should not be used to eliminate disruptive students from all schooling, but rather as a triggering mechanism for special help for such students. Since some alternative educational approaches offered by the school might be educationally or socially unacceptable to the student/parent, the new law provides a parental option for total exclusion from school (without the usual penalties for violating the compulsory education law) if an acceptable alternative cannot be worked out with the school. This approach raises a number of difficult questions (e.g., Is the consent informed?; Will the alternative make it easier for schools to exclude students from the regular class?), but on balance it seems preferable to the *status quo* which all too often excludes from the educational process the very students who are most in need of help. For a fuller discussion of these issues, see M. McClung, "Alternatives to Disciplinary Exclusion From School," 20 *Inequality in Education*[58] (July 1975).

In an earlier draft of the bill, the Education Committee considered setting out in considerable detail the parameters of acceptable student conduct, but concluded that this was a matter best left to the discretion of each local board of education. Therefore the Education Committee reported out a bill with more general standards which authorized the suspension or expulsion of "any pupil whose conduct endangers persons or property or is seriously disruptive of the educational process, *and* which conduct is violative of a publicized policy of such board." (emphasis added). A last minute floor amendment in the General Assembly, however, substituted the word "or" for "and" and thus left the final statute without general standards of conduct. Ironically, this amendment may leave the new law open to the same challenge which successfully invalidated the prior expulsion statute.

The old exclusion statute (Section 10–234 of the Connecticut General Statutes) was typical of many existing state statutes, simply authorizing explusion for "conduct inimical to the best interests of the school." On July 15, 1975 the Supreme Court of Connecticut upheld a lower court decision which found the old expulsion law too vague to constitute a valid delegation of power by the legislature. The Supreme Court stated: "What the phrase 'inimical to the best interests' may mean to different persons is virtually unlimited." *Mitchell* v. *King* (*Connecticut Law Journal*, July 15, 1975, at page 5). The Court continued:

> Section 10–234, when read in the light of the legal principles enunciated, is unconstitutionally vague on its face. It does not give fair notice that certain conduct is proscribed; it makes no distinction between student conduct on or off school property, during school hours or while school is not in session. It fails to provide any meaningful indication as to what range of behavior would legitimately subject a student to expulsion. Thus, the time, the place, and the nature of student conduct that might be deemed "inimical to the best interests of the school" would lie entirely within the subjective discretion of the board of education. A more specific standard is required. *Id.*

The task is to define prohibited conduct more clearly than with vague phrases like "inimical to the best interests" without going to the other extreme of trying to specify every conceivable kind of misconduct. A reasonable attempt to find middle ground between these two extremes is set forth in Sections 9.1 and 10.1 of "A Sample Student Code," *Phi Delta Kappan* (December 1974).

Rather than simply incorporating such standards in a statute or school disciplinary code and imposing them upon students, however, a strong argument can be made that standards of conduct are more likely to be accepted if the students are given an active role in helping to formulate (and implement) them. Thus a model exclusion statute might authorize "a joint student/faculty committee to suspend or expel any student for conduct it finds to endanger persons or property or to be seriously disruptive of the educational process, and which conduct violates one of the standards of conduct formulated and publicized by such committee." The advantages and disadvan-

tages of various models for student participation are discussed in the handbook *Codes of Student Rights and Responsibilities*, a forthcoming publication of the Center for Law and Education.

Many current state exclusion statutes probably cannot meet the legal test in *Mitchell* v. *King* quoted above. A vagueness challenge, however, even if successful, is not necessarily the best approach because it offers no solution for a legislative remedy clearly defining standards which are repressive or otherwise questionable. Another approach is to argue an equal protection violation in excluding disruptive children while providing education to other children needing special educational help (and to children who do not need special help). Two pending cases raise this issue: *Dunlap* v. *Charlotte Mecklenburg Board of Education*, C.A. No. 72–72 (W.D.N.C., filed April 17, 1972), and *Fox* v. *Benton*, C.A. No. 74–5–D (S.D. Iowa, filed February 8, 1974).

While a successful vagueness challenge does not in itself guarantee an acceptable remedy, it can force the legislature to rewrite an archaic exclusion statute, and a better approach to disruptive behavior may be incorporated in the process. This proved to be the case in Connecticut where some encouraging substantive provisions were incorporated in the new legislation. The Education Committee, however, refused to exercise a policy role in expanding protection prior to suspension (for example, by requiring an opportunity for parental involvement before the informal hearing so that the parents can be involved in working out a solution to the problem), and simply codified the minimal due process required by the U.S. Supreme Court in *Goss* v. *Lopez*, 95 S.Ct. 729 (1975).

Goss v. *Lopez* and cases like *Mitchell* v. *King* may encourage many states (and local school districts) to revise their laws and regulations concerning disciplinary exclusion from school. Those involved in formulating new standards may have to make some difficult choices between concentrating on procedural or substantive provisions. The courts' natural inclination for procedural remedies should not predetermine the approach. Policymakers obviously have much more flexibility. Rather than expanding due process requirements for short-term suspension, for example, it may be educationally preferable to minimize the harmful effects of suspension by providing opportunities to make up work and exams, expunging the disciplinary action from the student's record at the end of the year, and providing educational alternatives to exclusion which help to remedy the underlying problem.

—Merle McClung

Note: Many states are beginning to recognize the continuing obligation of their schools to educate children who have been expelled because of behavior problems. Compare the new Iowa, II.G. supra, Pennsylvania, II.H. supra, and Connecticut laws with the new California law which provides:

Ch. 1253

SEC. 3. Section 10605.1 is added to the Education Code, to read:

10605.1. A governing board that has voted to expel a pupil may suspend the enforcement of such expulsion for a period of not more than one full semester in addition to the balance of the semester in which the board votes to expel and may, as a condition of such suspended action, assign the pupil to a school, class, or program which is deemed appropriate for rehabilitation of the pupil. In lieu of other authorized educational programs to which the pupil may be assigned, such school, class, or program may be offered as a community-centered classroom and may include experiences for the pupil as an observer or aide in governmental functions, as an on-the-job trainee, and as a participant in specialized tutorial experiences or individually prescribed educational and counseling programs. Such programs shall include an individualized learning program to enable pupil to continue academic work for credit toward graduation and shall qualify for state apportionment based on average daily attendance for only those hours in courses which earn credit for graduation and which conform to the provisions of Section 11251 of the Education Code.

At the conclusion of the designated period during which an expulsion action is suspended, the governing board shall: (1) reinstate a pupil who has satisfactorily participated in a school, class, or program to which such pupil has been assigned as a condition of the suspended action and permit the pupil to return to the school of former attendance or voluntarily to attend other programs offered by the district; or (2) if a pupil's conduct has been unsatisfactory, enforce the expulsion action previously voted by the board.

If the pupil is reinstated, the board may also take action to expunge the record of the expulsion action.

III. Procedural Safeguards

III.A.2. Other Cases re Due Process Hearings

Catherine D. v. Pittenger, C.A. No. 74-2435, E.D.Pa., Consent Order, 6/27/75 (Clearinghouse #13,575B,D)

This action to insure procedural due process for those persons who are or are thought to be exceptional and in need of special education (other than those who are mentally retarded or thought to be mentally retarded) was settled when the state adopted regulations. See 22 Pa. Code Ch. 13. The regulations include safeguards against discriminatory testing, and disproportionate assignment of racial or ethnic groups; encouragement of mainstreaming; provision of qualified special education personnel in the schools; special education program guidelines; provision for placement in out-of-state institutions, private schools and special public schools for students with special needs; provision for opportunities for gifted children; and provisions on extensive due process safeguards. The safeguards come into play before a person has been classified exceptional or there has been a change in his or her status, and involve the right to a parent conference, the right to a formal due process hearing, the right to have classification based on substantial evidence, the right to counsel, access to records and test scores, the right to call witnesses, the right to present outside medical and psychological opinions, and the right to a prompt decision after the hearing (within 20 days). The court has "retain[ed] jurisdiction of the action until [the] provisions of the stipulation are properly implemented."

Note: Provisions concerning students mentally retarded or thought to be mentally retarded are set forth in a stipulation entered in PARC v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D.Pa., 1971).

ELB

Jacobs v. Ocean County Board of Education, Docket No. _____, Superior Court of New Jersey, Monmouth County-Chancery Division, Complaint, 6/75 (Clearinghouse #15,806A)

Class action challenging New Jersey statutory scheme for placement of students with special needs on the ground that it does not provide for a due process hearing prior to final decision-making. The complaint alleges that the named plaintiff was placed in three different approved residential schools for the years 1970-71 through 1974-75, after he was observed to have "a profound reading problem and a developing pattern of behavioral difficulties which interfered with his learning." It is further alleged the plaintiff made "dramatic" progress in 1974-75 in a school using a particular method of teaching reading, but that his mother was informed, without a hearing, that he would be returned for 1975-76 to a public school (where the particular reading method would not be used). The placement scheme is alleged to deny due process of law in violation of the fourteenth amendment.

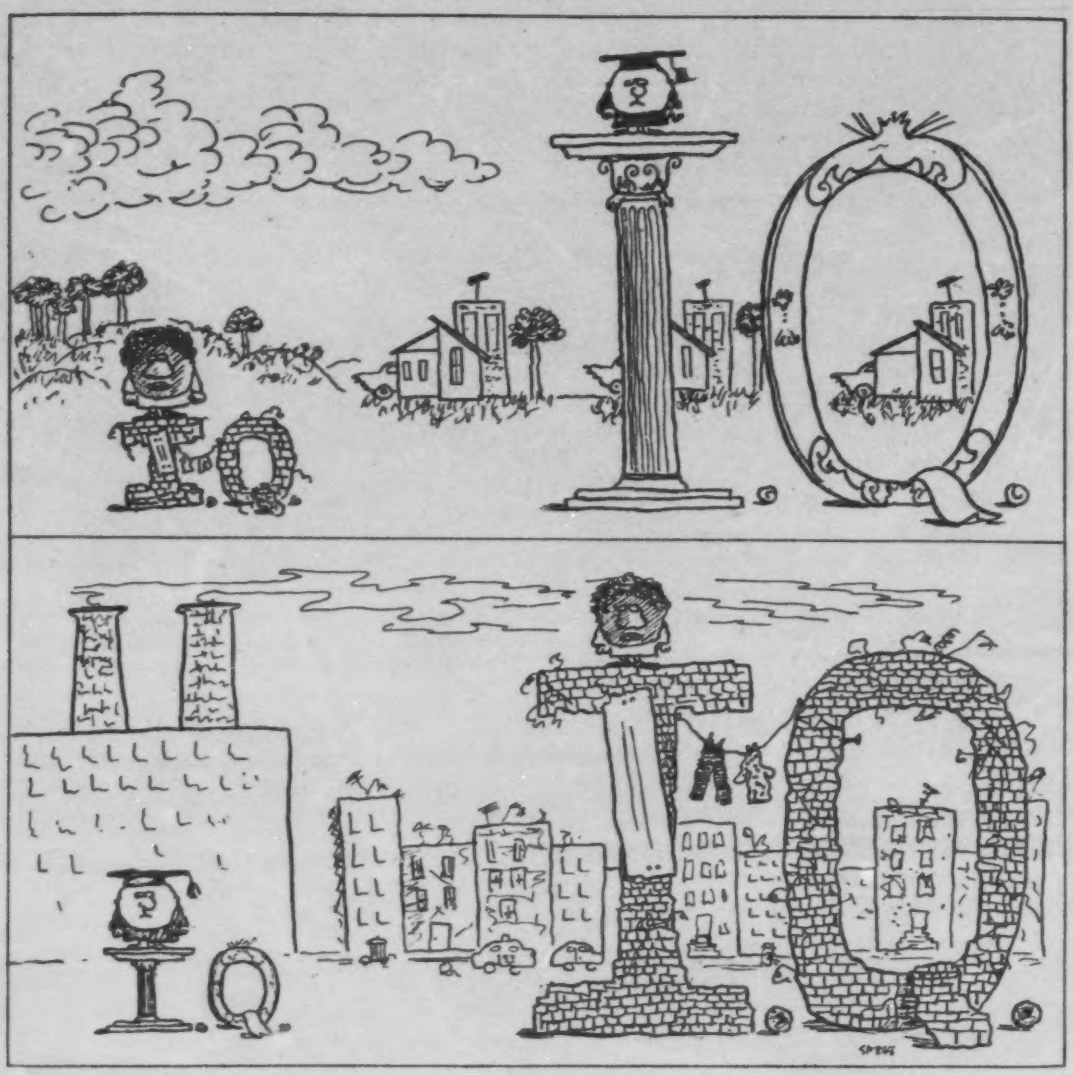
ELB

Note: See due process required by Federal law at VI.B., VI.C. and VI.D. infra.

III.B.1. "Legal Challenges to Educational Testing Practices"

This article was reprinted in 15 Inequality in Education 92 (November, 1973).

See Washington v. Davis, 44 L.W. 4789 (June 8, 1976), summarized at III.B.2 infra, for recent Supreme Court decision on testing.



III.B.2. Table of Cases on Testing

Parents in Action on Special Education (PASE) v. Redmond, C.A. No. 74C 3586, N.D. Ill., Complaint filed 12/12/74 (Clearinghouse Review #14352A)

Class action on behalf of Latino and black students who have been or will be misplaced in classes for educable mentally handicapped (EMH) students in Chicago schools, allegedly as a result of "arbitrary and discriminatory practices" in violation of federal law [i.e., the equal protection and due process clauses of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1703; and the Education of the Handicapped Amendments of 1974, 20 U.S.C. 1414]. It is alleged in part that Latino and black students comprise 63.5% of enrollment generally, but 81.5% of EMH classes; that EMH curriculum is diluted and classroom facilities inferior; that placement adversely effects future educational and employment opportunities and stigmatizes students; that misplacement results from reliance on "racially, culturally and linguistically discriminatory" tests and procedures; that reevaluation of students and remedial programs for students removed from EMH classes are not adequate; that over 50% of Latino students retested by Latino psychologists were found to be misplaced in EMH classes; that parents are not given proper notice of placement or their right to examine pertinent records and request an impartial hearing. Declaratory and injunction relief are sought as well as damages in favor of each named plaintiff in the amount of $15,000.

ELB

Washington v. Davis, 44 L.W. 4789 (June 8, 1976), a recent Supreme Court case on testing, is summarized on the next page.

Walter E. Washington, etc., et al., Petitioners, v. Alfred E. Davis et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 7, 1976]

Syllabus

Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 42 U. S. C. § 1981, and D. C. Code § 1-320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment, in view of the facts that 44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20—29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. *Held:*

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate.

168 U. S. App. D. C. 42, 512 F. 2d 956, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and II of which STEWART, J., joined. STEVENS, J., filed a concurring opinion. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

Note: The Supreme Court decided Washington v. Davis as this Supplement was being finalized for publication. The decision has obvious implications for challenges to many public school testing practices (see, e.g., Larry P. at III.B. infra) and for equal protection analysis generally. The result may be to focus more attention on statutory challenges to questionable testing practices (see, e.g., Part VI infra), but such a conclusion merits more careful consideration of Washington v. Davis than is possible here.

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III.B.3.e. *Diana v. State Bd. of Educ.*

Agreement Orders Elimination of Remaining Disproportions of Chicano Children in Mentally Retarded Classes

Diana v. *State Board of Education*, C-70 37 RFP (N.D. Cal., June 18, 1973) (stipulation and order) .

[A summary of the original complaint and the initial consent agreement of February 3, 1970 appears in 3-4 *Inequality in Education* 23.]

In 1970, the plaintiffs and the California State Board of Education agreed, with court approval, to new procedures for the placement of children in classes for the mentally retarded. These included testing in both English and children's primary language, the elimination of test items dependent upon vocabulary, general information, or other culturally biased verbal material, the reevaluation of previously placed Chicano and Chinese students on the basis of non-verbal test results in the primary language, the creation of a new or revised IQ test normed solely to Chicano students, and submission of an explanation from any district having a significant variance in racial or ethnic makeup between its classes for the educable mentally retarded and its total school enrollment.

In addition to evidence concerning the invalidity of the IQ tests as applied to Chicanos, the results of testing of plaintiffs in English by bilingual testers giving credit for responses in the primary language, and the harm involved in misplacement for the mentally retarded, the plaintiffs had cited a 1966-67 study showing that while Chicanos made up 13 percent of the state's school population, they comprised 26 percent of the students in classes for the mentally retarded. By 1973, the variance in most of the state's 1130 districts had been eliminated, but remained significant in approximately 235 districts. The new agreement attempts to eliminate the disparities in these remaining districts.

Under the new agreement, each of these districts with a "significant variance - (to be specified)" is required to submit a plan, including a timetable, for the elimination of the disparities by September 1976. These plans are further to provide that the percentage of Chicanos placed in classes for the mentally retarded each year until 1976 shall not exceed the percentage in the general district population and to provide a program of special assistance for children reclassified into regular classes. The State Department of Education shall conduct an investigation of any such district in which a disparity increases in any year or in any district in which a significant variance continues or occurs after September 1976. These terms also apply to any district which produces a significant variance after the agreement was reached.

This approach, focusing on statistical disparties, is consistent with *Larry P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), where the court ruled that evidence showing the percentage of black students in a district's classes for the educable mentally retarded to be more than twice that of the total black enrollment was sufficient to shift the burden of demonstrating a rational relationship between the tests and the ability to learn onto the school district, a burden which it failed to meet. (For a summary of *Larry P.*, see 13 *Inequality in Education* 71.) It is also consistent with the approach developed under the equal protection clause, the 1964 Civil Rights Act, and Equal Employment Opportunity Commission guidelines to deal with employment test discrimination as evidenced by statistical racial disparities. See, for example, *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.E. 2d 158 (1971); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973); *Baker v. Columbus Municipal Separate School District*, 329 F.Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972.) This approach obviates the need to show any discriminatory intent on the part of the school. It would not be particularly useful, however, in challenges to testing which are not based upon a showing of discriminatory results involving race, ethnicity, sex, or (perhaps) class, nor in direct substantive challenges to school classifications and programs themselves. Further, one commentator has been critical of the transfer of quota systems from such areas as employment and jury selection to education, largely because quota systems tend to pressure existing classifications and to ignore meaningful individual differences in education needs. See David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. Penn. L.Rev. 705, 773 (1973).

III.B.3.f. Contempt Order

Board of Education Held in Contempt for Failure to Comply with Stipulated Order to Eliminate Over-Representation of Chicano Children in Classes for Mentally Retarded

2859. Diana v. California State Board of Education, No. C-70-37-FRP (N.D. Cal., May 24, 1974). Plaintiffs represented by Dennis Powell, Maurice Jourdane, 328 Cayuga St., Salinas, Cal. 93901, (408) 424-2201; Martin Glick, 1212 Market St., San Francisco, Cal. 94102, (415) 863-4911. [Here reported: 2859D Memo and Order (5pp.). Previously reported at 7 CLEARINGHOUSE REV. 674 (March 1974).]

In June of 1973 the court adopted a stipulation which provided that the department of education would send letters to all school districts exhibiting a "significant variance" between the percentage of Chicano children in classes for the educable mentally retarded and the percentage of Chicano children in the school population at large. The state attempted to repudiate the order, contending that it was too ambiguous to be enforceable.

In its most recent order, the court has found defendants in contempt, interpreted the order as requested by plaintiffs, and ordered future compliance with it.

CR

III.B.4.f. *Larry P. v. Riles:* Order Expanding the Class

School Districts in California Enjoined From Administering IQ Tests to Black School Children

6806. Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal., Dec. 13, 1974). Plaintiffs represented by Armando Menocal, Michael Sorgen, Public Advocates, 433 Turk St., San Francisco, Cal. 94102, (415) 441-8850. Of counsel, Peter Pursley, Paul Roberts, Neal Snyder, 2701 Folsom St., San Francisco, Cal. 94110. [Here reported: 6806G Order (2pp.); 6806H Findings of Fact & Conclusions of Law (5pp.); 6806I Preliminary Injunction (3pp.).]

The court has granted plaintiff's motion to modify the class, and has ruled that this action is properly brought on behalf of all black California school children who have been or may in the future be classified as mentally retarded on the basis of IQ tests.

The court has enjoined the state Superintendent of Public Instruction and members of the state Board of Education from performing psychological evaluations of plaintiff and other black California school children by using the standardized individual ability or intelligence tests which do not properly account for the cultural background or experiences of these children. Furthermore, defendants were enjoined from placing black children into classes for the educable mentally retarded on the basis of the results of these tests. The court, however, denied plaintiffs' motion for injunctive relief restraining defendants from placing black children in classes for the educable mentally retarded in a proportion which exceeds the proportion of black children within a given school district. If after 120 days the percentage of black children in EMR classes in any school district exceeds the percentage of black children in the total enrollment within that district, plaintiffs may require defendants to demonstrate affirmatively that the IQ test used properly accounts for the cultural background and experiences of black children.

CR

Note: The official citation for this case is P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), affirmed 502 F. 2d 963 (9 Cir. 1974).

See Washington v. Davis, 44 L.W. 4789 (June 8, 1976), summarized at III.B.2 supra, for recent Supreme Court decision on testing.

III.B.7. Misclassification — Mental Retardation

Misclassification results whenever any of the labels commonly used in special education—emotionally disturbed, mentally retarded, hyperkinetic, and so on—is misapplied. Some school systems have been moving away from such labels since they are considered stigmatizing and unduly categorical, but misclassifications still can occur. Whatever the educational program or philosophy, an accurate diagnosis of the learning problem still is essential to formulating an appropriate educational program for the child. A child will almost always be misclassified and miseducated whenever his/her learning problem has not been accurately diagnosed.

Probably the largest group of misclassified children are those labeled mentally retarded. Garrison and Hammill (1971) report that of a sample of 378 children labeled retarded in thirty-six school districts in the Philadelphia area, independent evaluations indicate that the diagnosis for 25 percent of these children may be considered erroneous and an additional 43 percent may be questioned. Similarly, a Boston study has shown that over half of a group of twenty-one children labeled as retarded had I.Q.'s in the normal range; some of them manifested perceptual motor handicaps or emotional disturbance rather than mental retardation. Another study (Franks, 1971) indicates that when black students score low on I.Q. tests they tend to be tracked into mentally retarded classes, whereas low scoring whites tend to end up in remedial classes for the learning disabled.

The kind of due process hearing provided by *Mills* enables the parents to question the appropriateness of the school's classification of their child. One of the most obvious forms of misclassification occurs when a child is given an I.Q. test in a language other than his own. Placements based upon low I.Q. scores reflecting linguistic discrimination were successfully challenged in *Diana* v. *California State Board of Education* [C.A. C-70-37 R.F.P. (N.D. Cal. 1970) (consent agreement)]. A more subtle kind of cultural bias in testing black children was successfully challenged in *Larry P.* v. *Riles* [343 F.Supp. 1306 (N.D.Cal. 1972)]. Plaintiff children argued that the stigmatizing EMR (educable mentally retarded) label was applied to them on the basis of I.Q. test results which penalized unfamiliarity with white middle-class background. The court in *Larry P.* concluded that where the percentage of black children in special education (EMR) classes was more than twice the percentage of blacks enrolled in the school district, the I.Q. test scores that were primarily responsible for the racial imbalance were "suspect." Therefore, under equal protection analysis, the burden of proof in justifying the use of those I.Q. tests shifted to the defendants. Despite the argued educational need for identifying the educable mentally retarded and the alleged non-existence of better alternatives, the court concluded that the defendants had not sustained their burden of proving a rational relationship between scoring on the questioned I.Q. test and the ability of black students to learn. In the absence of such a demonstration, denial of equal protection to all such students was established, warranting issuance of preliminary injunctive relief as to future testing and future re-evaluations.

Removing culturally biased test items will not insure proper classification, however, as other requirements must be met to justify the label of mentally retarded. The American Association on Mental Deficiency (AAMD) defines mental retardation as *"significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior,* and manifested during the developmental period" (emphasis added). Significantly sub-average intellectual functioning is defined as two or more standard deviations from the mean or average of the test; that is, a score of 68 on the Standford-Binet Intelligence Scale and 70 on the Wechsler Intelligence Scale for Children. Measurements of adaptive behavior are necessary to eliminate "the six-hour retarded child" who is considered normal by family, friends, and community but labeled retarded by the school. Adaptive behavior is defined by the AAMD as

"the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group." The AAMD offers a set of objective behavior scales, and other groups also have developed or are developing similar "objective" measures of adaptive behavior.

These dual criteria—I.Q. *plus* adaptive measures—are incorporated in the consent agreement in *LeBanks* v. *Spears* [C.A. No. 71-2897 (E.D.La. April, 1973)]. *Lebanks* adds a third prerequisite to the mentally retarded label; the child still must be rated substantially sub-normal on both measures after the effects of socio-cultural background have been taken into account. These criteria are also incorporated in a recent consent agreement in *The Rhode Island Society for Autistic Children* v. *Board of Regents of Education of Rhode Island* [C.A.No. 5081 (D.R.I., September, 1975)]. The *RISAC* agreement further provides: "A parent may waive this requirement, but only after having been informed in writing that the American Association on Mental Deficiency recommends that no child with an I.Q. similar to that of his child be labelled retarded."

Excerpt from M. McClung, "The Legal Rights of Handicapped School Children," 54 Educational Horizons 25, 28-29 (Fall 1975), reproduced with permission.

Note: The RISAC stipulations are summarized at IV.C.1 infra; the LeBanks agreement is summarized at page 119 of the 1973 Edition of Classification Materials.

For more detailed discussion of the A.A.M.D. definition of mental retardation, see Grossman, Herbert J. (ed.), Manual on Terminology and Classification in Mental Retardation, 1973 Revision, American Association on Mental Deficiency, Garamond/Pridemark Press: Baltimore, 1973. See also Mercer, Jane, Labeling the Mentally Retarded, University of California Press: Berkeley, 1973.

III.C. New Massachusetts Special Education Act

On October 1, 1975, the Massachusetts State Department of Education issued an amended set of regulations to implement Chapter 766 of the Acts of 1972. This 109 page document, titled 766 Regulations, is available from the Massachusetts Department of Education, Division of Special Education, 182 Tremont Street, Boston, MA 02111.

For a discussion of the process which resulted in Chapter 766 and the subsequent regulations, see M. Budoff, "Engendering Change in Special Education Practices," 45 Harvard Educational Review 507 (November 1975).

III.D.3. Other Cases re Confidentiality of Records

Bush v. Kallen, 302 A.2d 142 (Sup. Ct. N.J., March 23, 1975), holds that attorney for mental patients entitled to inspect and copy medical records. There is no presumption of incompetency under New Jersey statute designed for patients' benefit.

White v. Davis, 13 Cal. 3d 757, 120 Ca. Rptr. 94, 533 P.2d 222 (Cal. Sup. Ct. 1975) declares an alleged police surveillance and data gathering operation at U.C.L.A. "a prima facie violation of the state constitutional right of privacy."

Merriken v. Cressman, 364 F.Supp. 913 (E.D. Pa. 1973), holds that the school could not require a student to take a personality test designed to reveal potential drug abusers. The court said, id. at 918:

> The fact that the students are juveniles does not in anyway invalidate their right to assert their Constitutional right to privacy. This court would add that the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech.

Note: See also cases based on the Buckley Amendment at III.D.7. infra.

III.D.4. Freedom of Information

Mans v. Lebanon School Board, 290 A.2d 866, 112 N.H. 160 (N.H. Sup. Ct. 1972). Court orders disclosure of school district's salary schedule for teachers under New Hampshire Right-to-Know Law.

Citizens for Better Education v. Board of Education of Camden, 308 A.2d 35, 124 N.J. Super. 523 (App.Div. 1973). Parents have right under New Jersey Right-to-Know Law to inspect computerized system-wide, grade-by-grade results of standardized testing program.

Chappel v. Commissioner of Education of New Jersey, 343 A.2d 811 (Superior Ct., N.J., App. Div., 1975). Appeal from decision of State Board of Education refusing to prevent dissemination of results of statewide achievement tests in reading and mathematics administrered to fourth and twelfth graders in November 1972. Petitioners argued in part that dissemination "will cause polarization within the school communities, racial conflict, degrading conflict, degrading stigmatization, illegal tracking. . . ." Under N.J.A.C. 6:39-1.2(a), release of individual pupil scores is limited "to a pupil, his parent or legal guardian, and school personnel and school officials deemed appropriate by the Commissioner." On appeal, petitioners concede that there would be no objection, if the test results were restricted for analysis by educational authorities and "as a pilot program, without . . . such a big to-do. . . ." Rulings (in affirming): (1) Regulations insure that the test results will be released with "interpretive data to lessen the possibility of public misinformation" and that the privacy of individuals will be safeguarded. Moreover, the information will be helpful to school personnel in allocating resources, shaping goals, and focusing on the improvement of basic

skills. (813-814) (2) Since the dissemination program is authorized by statute, the decision may only be upset if arbitrary, capricious or unreasonable. Here, the challenged actions are "entirely reasonable." (814) (3) The testing program involves "matters of fundamental educational policy." Therefore, it was not an issue involving "negotiation of terms and conditions of public employment." (814-815)

III.D.5. The Family Educational Rights and Privacy Act of 1974 (The "Buckley Amendment")

Section 438 of the General Education Provisions Act, as amended, which is effective as of November 19, 1974, sets out requirements designed to protect the privacy of parents and students. Specifically, the statute governs (1) access to records maintained by certain educational institutions and agencies, and (2) the release of such records. In brief, the statute provides: that such institutions must provide parents of students access to official records directly related to the students and an opportunity for a hearing to challenge such records on the grounds that they are inaccurate, misleading or otherwise inappropriate; that institutions must obtain the written consent of parents before releasing personally identifiable data about students from records to other than a specified list of exceptions; that parents and students must be notified of these rights; that these rights transfer to students at certain points; and that an office and review board must be established in HEW to investigate and adjudicate violations and complaints of this section. The office has been designated by the Secretary and may be contacted at the following address:

Mr. Thomas S. McFee
Room 5660
Department of Health, Education, and Welfare
330 Independence Avenue, SW.
Washington, D.C. 20201
Telephone (202) 245-7488

(The statute further provides, under subsection (c), that the Secretary shall promulgate regulations to protect the privacy of students and their families in connection with certain Federal data-gathering activities. The proposed rules set forth below relate to all of section 438 except subsection (c), which will be the subject of further regulations to be issued at a future date.)

For the convenience of readers, section 438, (except subsection (c)) as amended reads as follows:

Sec. 438. (a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be recurred [sic] as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of institutional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1), the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests;

Note: The Family Educational Rights and Privacy Act, Section 438 of the General Education Provisions Act, 20 U.S.C. Sec. 12329 (1974) [as it appears in 40 Fed. Reg. 1208 et seq., Jan. 6, 1975]

This act covers access to and release of STUDENT RECORDS.

(B) officials of other schools or school systems in which the student seeks or, intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 408(c) of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

(D) in connection with a student's applications for, or receipt of, financial aid;

(E) State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

(2) No funds shall be made available under any applicable program to any education agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an eduction agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4) (A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Regulations for the Family Educational Rights and Privacy Act of 1974

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

Subpart A—General

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AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart A—General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

(20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational agency or institution solely because students attending that nonmonetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records.

(20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247, as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education.

(20 U.S.C. 1232g)

"Directory information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

[20 U.S.C. 1232g(b)(1)]

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in § 99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

(20 U.S.C. 1232g(a)(3))

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided*, That education records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

(3)(i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

Note: These long-awaited regulations were published on June 17, 1976 -- too late to include any extended commentary in this Supplement. The Federal Register, Vol. 41, No. 118 (June 17, 1976) includes eight pages of summary comments and H.E.W. responses (pp. 24662-24670). The Secretary of H.E.W. emphasizes in introductory comments that while these are final regulations effective as of June 17, 1976, the Department intends to invite comments on the regulation and its operation during a ninety day period commencing July 1, 1977 in order to determine if changes in the regulation or the statute upon which it is based are necessary or appropriate.

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided*, That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

(20 U.S.C. 1232g(d))

"Financial Aid", as used in § 99.31(a)(4), means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g(b)(1)(D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g(d))

"Panel" means the body which will adjudicate cases under procedures set forth in §§ 99.65–99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g(a)(5))

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31(a)(8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g(d))

(c) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31(a)(1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

[20 U.S.C. 1232g (e) and (f)]

§ 99.6 Annual notification of rights.

(a) Each educational agency or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution

annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the notice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 438 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

[20 U.S.C. 1232g(e)]

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 438 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(c) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a)(3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f)(1) A waiver under this section may be revoked with respect to any actions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

[20 U.S.C. 1232g(a)(1) (B) and (C)]

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 438 of the Act and this part; *Provided*, That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

[20 U.S.C. 1232g(a)(1)]

Subpart B—Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 438 of the Act or this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided*, That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purposes for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided*, That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7(c).

(20 U.S.C. 1232g(a)(1)(B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g(a)(1)(A))

§ 99.13 Limitation on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21(d), and

(c) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g(f))

Subpart C—Amendment of Education Records

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

[20 U.S.C. 1232g(a)(2)]

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

[20 U.S.C. 1232g(a)(2)]

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21(a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing;

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

[20 U.S.C. 1232g(a)(2)]

Subpart D—Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a)(1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

[20 U.S.C. 1232g(b)(1) and (b)(2)(A)]

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

(b) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(1)]

§ 99.32 Record of disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply to disclosures to a parent of a student or an eligible student, disclosures pursuant to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures, to school officials under § 99.31(a)(1), or to disclosures of directory information under § 99.37.

(c) The record of disclosures may be inspected:

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31(a)(1) and (3).

(20 U.S.C. 1232g(b)(4)(A))

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided*, That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(4)(B)]

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(ii) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided*, That the disclosure meets the requirements of paragraph (a) of this section.

[20 U.S.C. 1222g(b)(1)(B)]

§ 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements.

[20 U.S.C. 1232g(b)(3)]

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

[20 U.S.C. 1232g(b)(1)(I)]

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

[20 U.S.C. 1232g(a)(5)(A) and (B)]

Subpart E—Enforcement

§ 99.60 Office and review board.

(a) The Secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in §§ 99.65–99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education, and Welfare, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g(g))

§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60(b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part, and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(f) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible students by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b)(1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b)(1) of this section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c)(1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c)(2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c)(3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64–99.67, inclusive.

(20 U.S.C. 1232g(f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

(20 U.S.C. 1232g(f))

§ 99.65 Hearing procedures.

(a) *Panels.* The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1)(ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories

(20 U.S.C. 1232g(g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g(g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

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III.D.6. Special Regulations re Records of Handicapped Children

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

State Plan Provisions

Notice of proposed rulemaking was published in the FEDERAL REGISTER on November 26, 1975 (40 FR 54804) setting forth proposed amendments to Part 121a of Title 45 of the Code of Federal Regulations. The amendments (1) added a new paragraph (g) to § 121a.10 which essentially repeated the statutory language of section 613(b)(1) of the Education of the Handicapped Act (EHA), added by Public Law 93-380. Section 613(b)(1) requires that each State's annual program plan be amended to include (among other things) policies and procedures to identify, locate and evaluate all handicapped children residing in the State who are in need of special education and related services, and to protect the confidentiality of data collected in that effort under criteria promulgated by the Commissioner. (2) The amendments also proposed a new § 121a.15 setting forth the criteria which the State would be required to use to develop its policies and procedures for protecting the confidentiality of the data.

Subsequent to publication of the proposed rules, legislation was enacted which included provisions (effective on November 29, 1975) which apparently modify the requirements of section 613(b)(1) in certain particulars, as set forth below in the changes relating to § 121a.10(g) (see section 612(a)(A), (C), (D), and (E) of the EHA, as amended by the Education of All Handicapped Children Act, Public Law 94-142 (enacted November 29, 1975)). As indicated, those changes have been incorporated with other comments in these revised regulations.

Interested parties were invited to submit comments, suggestions, or objections regarding the proposed regulations. These comments are summarized and the responses of the Department are provided below. The comments are arranged in order of the sections of the proposed regulations (the final regulations are in the same order, but have been renumbered in part since proposed subparagraph (5) has been deleted).

* * * * *

Summary of comments and responses omitted.

* * * * *

Effective date. Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), these rgeulations have been transmitted to the Congress concurrently with the publication in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action and adjournment

(Catalog of Federal Domestic Assistance Programs No. 13.449, Handicapped Presch and School Programs)

Dated: February 4, 1976.

T. H. BELL,
U.S. Commissioner of Education.

Approved: February 18, 1976.

DAVID MATHEWS,
Secretary of Health, Education, and Welfare.

Title 45 of the Code of Federal Regulations is amended as follows:

1. Section 121a.10 is amended by adding a new paragraph (g), to read as set forth below.

§ 121a.10 Special provisions and descriptions.

* * * * *

(g) Set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that:

(1) All children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(2) Policies and procedures are established by the State in accordance with the criteria set out in § 121a.15 to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by State and local educational agencies under Part B of the Act;

(3) There is established:

(i) A goal of providing full educational opportunities to all handicapped children;

(ii) A detailed timetable for accomplishing such a goal; and

(iii) A description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal; and

(4) The policies and procedures submitted by the State under this paragraph shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission for approval to the Commissioner.

(20 U.S.C. 1412(2)(A), (C), (D), and (E) and 1417(c))

2. A new § 121a.15 is added, to read as follows:

§ 121a.15 Data confidentiality criteria.

(a) *Definitions.* As used in this section: "Consent" means that:

(1) The parent has been fully informed of the information set out in § 121a.15(b)(1)(i) in his or her native language, unless it clearly is not feasible to do so;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent sets forth that activity and lists the records (if any) which will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent.

"Destruction" means physical destruction or removal of personal identifiers from data so that the data is no longer personally identifiable.

"Formal evaluation" means evaluation, interviewing or testing procedures under Part B of the Act used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school.

"Parent" means a parent or guardian (or individual acting as a parent in the absence of a parent or guardian) of any child on whom data is collected, maintained, or used for the purposes set forth in § 121a.10(g)(1).

"Participating agency" means any agency or institution which collects, maintains, or uses data, or from which data is obtained, to meet the requirements set out in § 121a.10(g)(1).

"Personally identifiable" means that the data includes:

(1) The name of the child, the child's parent, or other family member;

(2) The address of the child;

(3) A personal identifier, such as the child's social security numbe, or student number; or

(4) A list of personal characteristics or other information which would make

FEDERAL REGISTER, VOL. 41, NO. 40—FRIDAY, FEBRUARY 27, 1976 at p.8608.

it possible to identify the child with reasonable certainty.

"Procedure" means a course of action which will be taken to implement a policy.

(b) *Policies and procedures.* The policies and procedures required under § 121a.10(g)(2) shall be established in accordance with the following criteria:

(1) *Notice.* (i) The State educational agency shall provide notice which is adequate to fully inform parents about the requirements set forth in § 121a.10(g)(1), including:

(A) A description of the extent to which the notice will be given in the native languages of the various population groups in the State;

(B) A description of the children on whom data will be maintained, the types of data sought, the methods the State intends to use in gathering the data (including the sources from whom data will be gathered), and the uses to be made of the data;

(C) A summary of the policies and procedures to be followed by participating agencies regarding storage, disclosure to third parties, retention, and destruction of all personally identifiable data; and

(D) A description of all of the rights of parents, and children regarding this data, including the rights under section 438 of the General Education Provisions Act.

(ii) The notice shall include, but not be limited to, notice published in newspapers having Statewide and local circulations prior to any major identification or location activity.

(2) *Access rights.*

(i) Each participating agency shall permit parents to inspect and review any personally identifiable data relating to their children which is collected, maintained, or used by the agency in complying with § 121a.10(g)(1). The agency shall comply with a request without unnecessary delay and prior to any hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(ii) The right to inspect and review education records under paragraph (b)(2)(i) of this section includes:

(A) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the data; and

(B) The right to request that the agency provide copies of the records containing the data where failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the data.

(iii) An agency may presume that the parent has authority to inspect and review data relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation and divorce.

(iv) Each participating agency shall keep a record of parties obtaining access to data collected, maintained, or used under § 121a.10(g)(1) (except access by parents and authorized employees of the participating agency under this subparagraph), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the data.

(v) If any record includes data on more than one child, the parents of those children shall have the right to inspect and review only the data relating to their child or to be informed of that specific data.

(vi) Each participating agency shall provide parents on request a listing of the types and locations of data collected, maintained, or used by the agency.

(A) A participating agency may charge a fee for copies of records which are made for parents under this subparagraph; *Provided*, that the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(B) A participating agency shall not charge a fee to search for or to retrieve data under this subparagraph.

(vii) This subparagraph (2) shall apply to each participating agency and to all personally identifiable data collected, maintained, or used for the purposes set forth in § 121a.10(g)(1).

(3) *Hearing rights:*

(i) A parent who believes that data collected, maintained, or used under § 121a.10(g)(1) is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency which maintains the data to make appropriate amendments to the data.

(ii) The agency shall decide whether to amend the data in accordance with the request within a reasonable period of time of receipt of the request.

(iii) If the agency decides to refuse to amend the data in accordance with the request it shall so inform the parent of the refusal, and advise the parent of the right to a hearing under this subparagraph.

(iv) The agency shall, on request, provide an opportunity for a hearing in order to challenge data to insure that it is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child. The hearing shall be conducted in accordance with this subparagraph.

(v) If, as a result of the hearing, the agency decides that the data is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the data accordingly and so inform the parent in writing.

(vi) If, as a result of the hearing, the agency decides that the data is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the data and setting forth any reasons for disagreeing with the decision of the agency.

(vii) Any explanation placed in the records of the child under paragraph (b)(3)(vi) of this section shall:

(A) Be maintained by the agency as part of the records of the child as long as the record or contested portion thereof is maintained by the agency; and

(B) If the records of the child or the contested portion thereof is disclosed by the agency to any party, the explanation shall also be disclosed to the party.

(viii) The hearing required to be held under this subparagraph shall be conducted according to procedures which shall include at least the following elements:

(A) The hearing shall be held within a reasonable period of time after the agency has received the request, and the parent shall be given notice of the date, place, and time, reasonably in advance of the hearing;

(B) The hearing shall be conducted by a party who does not have a direct interest in the outcome of the hearing;

(C) The parent shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under paragraph (b)(3)(vi) of this section, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(D) The agency shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(E) The decision of the agency shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

(ix) The policies and procedures described under § 121a.10(g)(2) shall include any rights of appeal to the State educational agency from decisions made by participating agencies under this subparagraph.

(x) This subparagraph (3) shall apply to each participating agency and to all personally identifiable data collected, maintained, or used for the purposes set forth in § 121a.10(g)(1).

(4) *Consent.* (i) Parental consent shall be obtained before data are:

(A) Disclosed to anyone other than officials of participating agencies collecting or using the data for the purposes set out in § 121a.10(g)(1), except as provided in paragraph (b)(4)(ii) of this section;

(B) Used for any purpose other than those specified in § 121a.10(g)(1); or

(C) Sought directly from the child by formal evaluation.

(20 U.S.C. 1412(2)(d) and 1417(c))

(ii) An educational agency or institution subject to section 438 of the General Education Provisions Act may not release data from education records to participating agencies without parental consent except as provided in section 438(b) of that Act and Part 99 of this title.

(iii) The State shall describe the policies and procedures which will be used in the event that a parent refuses to provide consent under paragraph (b)(4) of this section.

(5) *Safeguards.* (i) Each participating agency shall protect the confidentiality of data at collection, storage, disclosure, and destruction stages;

(ii) One official at each participating agency shall assume responsibility for assuring the confidentiality of any personally identifiable data;

(iii) All persons collecting or using personally identifiable data shall receive training or instruction regarding the State's policies and procedures developed under § 121a.10(g)(2) and regarding Section 438 of the General Education Provisions Act.

(iv) Each participating agency shall maintain, for public inspection, a current listing of the names of those employees within the agency who may have access to the personally identifiable data.

(6) *Destruction of data.* (i) All personally identifiable data collected for the purposes set forth in § 121a.10(g)(1) shall be destroyed within five years after the data is no longer needed to provide educational services to the child, except that a permanent record consisting of a student's name, address, and phone number, his/her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation;

(ii) Prior to destruction of data, reasonable efforts shall be made to notify parents that they have the right to be provided with a copy of any data which has been obtained or used for the purposes set forth in § 121a.10(g)(1).

(7) *Children's rights.* The policies and procedures required under § 121a.10(g)(2) shall include the extent to which children will be accorded rights of privacy similar to those accorded to parents, taking into consideration the age of the child and type or severity of handicapping condition.

(20 U.S.C. 1413(b)(2))

(8) *Enforcement.* The State shall specify the policies and procedures, including sanctions, which the State will use to insure that its policies and procedures will be followed and that the requirements of the Act and the regulations in this part will be met.

(c) With respect to personally identifiable data (if any) collected by the Office of Education and its authorized representatives, where that data would not otherwise be subject to the provisions of 5 U.S.C. 552a (the Privacy Act of 1974), the Commissioner will apply the requirements of 5 U.S.C. section 552a(b)(1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n) and the regulations implementing those provisions set forth in Part 5b of this title.

(20 U.S.C. 1412(2)(D) and 1417(c))

[FR Doc.76-5338 Filed 2-26-76;8:45 am]

Note: Like many other federal regulations, these were promulgated only after interested persons filed suit in federal court, as summarized below.

16,897. American Council of the Blind v. Mathews, No. 75-1890 (D.D.C., Dec. 31, 1975). Plaintiff represented by Stephen Berzon, Michael Trister, Children's Defense Fund, 1520 New Hampshire Ave., NW, Washington, D.C. 20036, (202) 483-1470; Marian Edelman, Durwood McDaniel. [Here reported: 16,897D Stipulation and Consent Decree (3pp.). Previously reported at 9 CLEARINGHOUSE REV. 639 (Jan. 1976).]

Plaintiffs, handicapped children in need of educational services, alleged that HEW violated the Education of the Handicapped Act (EHA) by failing to promulgate regulations setting forth the criteria which states should use to ensure the confidentiality of the information obtained during the process of identifying, locating and evaluating handicapped children. The parties have now settled the suit, following the issuance of such regulations in proposed form, to be promulgated in final form by March 1, 1976. Under the terms of the settlement, defendants shall not make any FY 1976 fourth quarter grant under Part B of EHA to any state until they have received in substantially approvable form a complete FY 1976 annual program plan amendment which meets the requirements of confidentiality.

CR

III.D.7. Implementation of Buckley Amendment Rights

California Senate Bill No. 182, 1975-76 (Clearinghouse No. 16,830)

This law is designed to conform California law on pupil records to the federal "Buckley Amendment," 20 U.S.C. 1232g. It contains separate sections applicable to school districts and community colleges. The law, inter alia, covers definition of pupil records, notification requirements, rights of access. and privacy of records. The law also provides that a grade given by a pupil's teacher "shall be final" except where there is "mistake, fraud, bad faith, or incompetency...." (§10937(a)) A student's grade in a physical education class may not be adversely affected due to failure to wear standardized apparel where this is beyond the student's control. (§10937(b)) Enacted.

ELB

Massachusetts Regulations, 1/14/75 (Clearinghouse Review #14, 769)

Regulations on student records adopted by Massachusetts Board of Education pursuant to state statutory mandate. The regulations cover the person(s) who may assert rights under the regulations, definitions, the type of information which may be added to the student record, personal files on students maintained by school employees, the persons responsible for maintaining privacy and security, destruction of records, access to and dissemination of records, amending student records, appeals and the obligation to give notice of the regulations.

ELB

Note: Minor amendments to these regulations were adopted by the Massachusetts State Board of Education on February 24, 1976.

Guidelines on Pupil Records, Connecticut State Department of Education, Hartford, Connecticut (1975) (Clearinghouse #16,008)

Connecticut's Bureaus of Pupil Personnel and Special Education Services have formulated guidelines on pupil records that take account of federal law (Family Educational Rights and Privacy Act of 1974). The regulations cover the following topics; division of records into three categories; notice to parents when certain information is gathered; "personal professional files"; personnel responsible for records; review of records; life duration of records; release of records; pupil and parent access to records; amending student records; appeal procedures for pupils and parents; and notice to parents and pupils. In addition, there are sample forms to effectuate certain provisions.

Note: We do not consider these guidelines to be be as clear or substantively sound as the Massachusetts Regulations.

ELB

Watson v. Costanzo, No. 75-459, E.D. Pa., Complaint, 2/18/75 (Clearinghouse Review #14, 513A, B, C)

Class action challenging the involuntary student transfer and record keeping policies of the School District of Philadelphia. The complaint alleges that the school system does not publish regulations on when a student may be transferred, give notice of charges, or afford a hearing to a student who is being transferred for disciplinary reasons. It is also alleged that defendants maintain unverified, misleading and inappropriate information in student's records without informing them either that they may have access to their records or that they may contest the information which the records contain. The named plaintiff, a twelfth grader, was arrested, suspended and transferred after an incident in which school records could be interpreted as charging plaintiff with theft. The action was based upon the First, Fifth, Ninth and Fourteenth Amendments and §438 of the "Family Educational Rights and Privacy Act". After filing of the action, the system, consented to relief on sealing of records, non-communication of information, and provision of information on records policies.

ELB

P. v. Riles, C.A. No. 121905, Superior Court, California, Los Angeles County, Order, 9/17/75 (Clearinghouse #16723)

Action on behalf of seven-year-old noncitizen child without immigrant status enrolled in El Centro School District. Sections 6950 et seq. of the California Education Code require certain state officials to provide the names and addresses of such enrollees to the U.S. Immigration and Naturalization Service. Rulings: (1) The challenged disclosure is inconsistent with Section 1232g(b)(1)(E) of the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g(b)(1). (2) The state defendants are (a) enjoined from promoting, directly or indirectly, disclosure of the identities of noncitizen children without immigration status to unauthorized persons, or to authorized persons (under the Privacy Act) without written assurance that the information will not be transmitted to the Immigration and Naturalization Service, and (b) from failing within 60 days to issue written directives to all California school systems in accord with (a). (3) The El Centro District is similarly enjoined from disclosure.

ELB

See also "The Buckley Amendment: Opening School Files for Student and Parental Review", 24 CATHOLIC U.L. REV. 588 (Spring 1975).

"Your School Records: Questions & Answers About a New Set of Rights for Parents & Students",1975. Pp.12. This booklet examines the Buckley Amendment and the rights of parents and students to see, correct and control access to student records. Available from the Children's Defense Fund, Washington Research Project, Inc., 1520 New Hampshire Ave., N.W., Washington, D.C. 20036.

III.E.1. Behavior Modifying Drugs

Behavior Modifying Drugs

Some schools effectively condition a student's continued attendance in a regular or special class upon parental consent to the use of behavior-modifying drugs on the student.[3] At one time tranquilizers were often prescribed to calm hyperkinetic children, but now stimulant drugs are in vogue because some studies have found that amphetamines and other stimulant drugs paradoxically increase attention span.[4] Although there are very few follow-up studies of the side effects of these drugs, some uses of stimulant drugs on some children under a physician's supervision appear justified.[5] But very few "troublesome" children are truly hyperkinetic, and stimulant drugs are being used on children who are mislabeled as hyperkinetic,[6] or are tagged with catch-all labels like "minimal brain dysfunction" (or "functional behavior disorder") which include a wide variety of "symptoms", many of which are common to almost all grade school children.[7]

Prescribing amphetamines or other drugs in an attempt to modify behavior represents a considerable medical intervention, and may not be the least restrictive intervention even for those children who are truly hyperkinetic. In June of 1973, a California medical researcher, Dr. Ben Feingold, reported to the American Medical Association his initial findings that artificial colors and flavors in foods and beverages may contribute to hyperactivity. Dr. Feingold claims to have successfully treated more than fifty children with hyperkinesis by prescribing a special diet free of the artificial additives found in convenience foods and soft drink powders.[8] Not only is prescription of a special diet a less restrictive intervention than behavior modifying drugs, but it also has the obvious advantage of addressing the cause rather than symptoms of the problem for those children whose hyperactivity is due to artificial additives in food. The National Institute of Education has funded further independent research of Dr. Feingold's findings.

The potential for misuse of drugs to control school children who exhibit non-conforming behavior has led to some proposals to prohibit their use.[9] A somewhat different approach has been adopted in Massachusetts where legislation[10] prohibits the administration of any psychotropic drug listed by the department of public health unless the school has obtained certification from the commissioner of public health or designee that the administration of such drugs in school is a legitimate medical need of the student, and then limits administration of approved medication to a registered nurse or a licensed physician. The act also prohibits administration of psychotropic drugs to students for the purposes of clinical research.[11]

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[3] "This procedure is needed, the psychologist says, if the child is to stay in the regular program. In some urban areas, however, the parent is told bluntly that unless the child receives treatment (i.e., medication), he will face suspension or be transferred to a special program for the emotionally disturbed. . . . The school often refers the child to a doctor who specializes in learning disabilities and routinely uses drugs in his treatment." D. Divoky, "Toward a Nation of Sedated Children," *Learning* (March 1973) at 8, 10. See generally the special report on behavior-modifying drugs in 8 *Inequality in Education* at 1-24.

In this troubling area where the medical evidence and educational issues are so complex, and where parents are subject to unusual pressure to submit to medication, it is especially important that procedural safeguards are developed to insure that parental consent to medication for the child is informed and without duress. Also, it should be obvious from *infra* notes 5-7 that only qualified doctors (preferably not school employees or referees) should label children as in need of behavior-modifying drugs.

[4] See, *e.g.*, C.K. Connors, *et al.*, Dextroamphetamine Sulfate in Children with Learning Disorders," 21 *Archives of General Psychiatry* 182-190 (1969); C.K. Connors, "Psychological Effects of Stimulant Drugs in Children with Minimal Brain Dysfunction," 49 *Pediatrics* 702-708 (1972); L. Eisenberg, "The Clinical Use of Stimulant Drugs in Children," 49 *Pediatrics* 709-15 (1972). A bibliography of such articles can be obtained from the Center for Law and Education.

[5] Compare the following:

> "The fact that these dysfunctions [hyperkinetic behavioral disturbance] range from mild to severe and have ill-understood causes and outcomes should *not* obscure the necessity for skilled and special interventions. The majority of the better known

diseases—from cancer and diabetes to hypertension—similarly have unknown or multiple causes and consequence. . . . Yet useful treatment programs have been developed to alleviate these conditions." Report on "Conference on Stimulant Drugs for Disturbed School Children," 8 *Inequality in Education* 14, 15.

"The Medical Letter on Drugs and Therapeutics," a conservative, non-profit publication aimed at clinicians, describes the data on the use of amphetamine-type drugs on children as "meager" and goes on to charge that "there are no adequately controlled long-term studies of the use of stimulants on noninstitutionalized hyperactive children with IQs in the normal range who have only mild neurological abnormalities. Yet it is in such children that the diagnosis of 'minimal brain dysfunction' is most often made and for whom amphetmines may be prescribed. . . ." Divoky, *supra* note 3, at 10.

6 "So common and so misleading are these symptoms that some doctors estimate that less than half of the children labeled hyperactive by teachers and sent for special treatment are in fact hyperactive." Divoky, *supra* note 3, at 8.

The "Conference on Stimulant Drugs," *supra* note 5 at 15, states that there is no single diagnostic test and the diagnosis should be made by a specialist. "In diagnosing hyperkinetic behavioral disturbance, it is important to note that similar behavioral symptoms may be due to other illnesses or to relatively simple causes. Essentially healthy children may have difficulty maintaining attention and motor control because of a period of stress in school or at home. It is important to recognize the child whose inattention and restlessness may be caused by hunger, poor teaching, overcrowded classrooms, or lack of understanding by teachers or parents. Frustrated adults reacting to a child who does not meet their standards can exaggerate the significance of occasional inattention or restlessness. Above all, the normal ebullience of childhood should not be confused with the very special problems of the child with hyperkinetic behavioral disorders."

7 "The most commonly used of the 38 terms applied to a grab-bag set of symptoms found in grade school children is minimal brain dysfunction (MBD). . .-. Hyperkinesis, the other most popular and misused label, is often used synonymously with MBD, or is described as the result of MBD." "And a new one, particularly favored by drug makers because it will cover anything: functional behavior disorder." Divoky, *supra* note 3, at 7.

"The condition commonly called minimal brain dysfunction—MBD—is not easy to diagnose: Specialists spend from six hours to three days on the diagnosis." 8 *Inequality in Education* at 8.

8 *CNI Weekly Report* (Nov. 1, 1973) (published by Community Nutrition Institute, 1910 K. St., N.W., Washington D. C. 20006); Ben F. Feingold, *Why Your Child is Hyperactive* (1975).

9 See, *e.g.*, The National Welfare Rights Organization's Petition of April 2, 1971 to the Food and Drug Administration "To Withdraw Approval of Methylphenidate Hydrochloride [Ritalin] For Use in Hyperkinetic Behavior Disorders in Children." Petition denied in decision of March 17, 1972.

10 M.G.L. Chapter 71, s.54B.

11 See generally the regulations developed by H.E.W. for the "Protection of Human Subjects" which limit the nature and methods of research funded by the Department. 39 *Federal Register* 18914 (May 30, 1974). See also the proposed supplementary regulations for children, prisoners, and the mentally infirm. 38 *Federal Register* 31738 (November 16, 1973).

The use of behavior modifying drugs raises constitutional questions since "autonomy over one's own body, without intrusion of drugs which modify behavior—*no matter how beneficial*—is a matter of ultimate personal concern." For possible substantive challenges and procedural safeguards, see Roderick Ireland and Paul Dimond, "Drugs and Hyperactivity: Process is Due," 8 *Inequality in Education* 19.

From 20 Inequality in Education at 59, 70-71 (July 1975).

III.E.2. *Benskin v. Taft City School District*

Challenge School District's Practice of Coercing Parents to Consent to Have Behavior Modification Drugs Administered to Their Children as a Condition of Attendance

16,431. Benskin v. Taft City School District, No. 136795 (Cal. Super Ct., Kern County, filed Sept. 8, 1975). Plaintiffs represented by Susanne Martinez, Pauline Tesler, Peter Sandmann, Youth Law Center, 693 Mission St., San Francisco, Cal. 94105, (415) 495-6420. Of counsel, Kathleen Davis, law student. [Here reported: 16,431A Complaint (82pp.).]

This suit was filed by 17 elementary school children against a school district for coercing parents into giving their consent to have a psychoactive or behavior modification drug, Ritalin, administered to their children as a condition of attending school. This amphetamine-type drug is used upon so-called hyperactive children to "slow" them down in school. Plaintiffs attack defendant's practice of prescribing the drug for children, using Title I funds to purchase the drug, and coercing parents into agreeing to permitting the school to give the children the drug under threats of excluding them if they refuse to consent.

Plaintiffs contend that defendants acted beyond the scope of their legal authority in prescribing the medical treatment of children, violated the parents' right to determine the medication treatment of their children, imposed an unconstitutional condition upon public school attendance, misused federal funds in purchasing the drug for the children, committed battery upon the children by causing them to ingest the drug without the informed consent of their parents, and violated state and federal narcotics laws in giving children Ritalin pills out of their classmates' prescriptions. The parents allege that the children all suffered various temporary and permanent side-effects, such as headaches, insomnia, stomachache, growth retardation, and in several cases, epileptic seizures, as a result of taking the drug. They seek compensatory and punitive damages against the school district and various named employees for forcing children to take the drug.

Plaintiffs also seek to enjoin defendant's practice of placing children in classes for the mentally retarded without the knowledge or consent of their parents, without hearings, notice or review.

CR

Note: For more on behavior modifying drugs, including some legal theories for challenging school officials' authority to administer drugs to children, see pages 343-48 of The Constitutional Rights of Students: Analysis and Litigation Materials for the Students Lawyer, available from the Center for Law and Education. See also William Wells, "Drug Control of School Children: The Child's Right to Choose, 46 So.Cal.L.Rev. 602 (1973).

IV. Inadequate Programs

IV.B. "Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?"

A slightly revised version of this article appeared in 3 Journal of Law & Education 153 (April 1974).

The kinds of Rodriguez distinctions suggested in this article, for arguing that education may still be a fundamental interest where minimally adequate education or constructive exclusion is at issue, now have some judicial support. See C.A.R.C. at I.F. supra, Fialkowski at IV.D. infra, Frederick L. at IV.D. infra. But cf. Wilson at IV.D. infra.

There is also some judicial support now for the argument made in this article that some handicapped children meet the criteria set forth in Rodriguez for a suspect class. Thus footnotes 6 and 27 should now include references to C.A.R.C. at I.F. supra, In re G.H. at I.D. 3. supra, Fialkowski at IV.D. infra. The National Center for Law and The Handicapped, 1235 North Eddy Street, South Bend, Indiana 46617, has prepared a brief setting forth the history of discrimination against handicapped children and other arguments for concluding that handicapped children meet the Rodriguez criteria for a suspect class.

Where courts do not find the fundamental interest or suspect class necessary for strict review, they may provide a moderate review somewhere in between traditional "restrained" and "strict" review. Thus the Gunther article cited at footnote 7 in the article should now include reference to the citations set forth in the Frederick L. excerpt at IV.D. infra.

The"Right to Treatment"section should now include reference to O'Connor v. Donaldson, 95 S.Ct. 2486 (1975).

The state law section should now cite M.A.R.C. at IV.D. supra.

Given the difficulty of many of the federal constitutional claims, lawyers should consider first their claims under a developing body of state and federal statutory law.

Encouraged in large part by cases such as P.A.R.C. and Mills and by Federal requirements such as 20 U.S.C. sec. 1413, VI.B. infra, many states have completely revised their special education laws in the last few years.

Finally, a section should be added to this article analyzing the claims for adequate or suitable education under federal law. Under the Education Amendments of 1974, VI.B. infra, State plans must establish a goal of providing "full educational opportunities to all handicapped children," and the implementing regulations describe the kind of projects necessary "to meet the special educational and related needs of handicapped children" (See 40 Federal Register 18998, May 1, 1975 at 19002, section 124a.24). The H.E.W. Memorandum at VI.C. infra states that "failure to assess individually each student's needs and assign her or him to a program designed to meet those individually identified needs" may constitute a violation of Title VI or Title IX where there is an adverse racial or sexual impact on children. And the first draft of of regulations to implement Section 504 of the Rehabilitation Act of 1973, VI.A. infra, includes a section describing requirements for a "suitable education" for handicapped persons (See 41 Federal Register 20296, May 17, 1976 at 20308, section 84.36).

And as of October 1, 1977, in order to qualify for assistance under the "Education for all Handicapped Children Act of 1975," P.L. 94-142, VI.D. infra, each State plan must include detailed policies and procedures to assure that "a free appropriate public education will be available for all handicapped children. . . within the State not later than September 1, 1978. . . ." Sec. 612(2)(B). Part of the definition of "free appropriate public

education" under 94-142 is that special education and related services are provided in conformity with an individualized written education program for each handicapped child. P.L. 94-142 also provides parents a hearing before the local board of education with rights to appeal first to the State education agency and then to either state court or federal district court without regard to the amount in controversy.

See Part VI infra for a summary of these and other federal laws.

IV.C.1. *RISAC* Stipulation on Settlement

RISAC v. Board of Regents, C.A. No. 5081, D.R.I., Stipulations on Settlement, 9/75 (Clearinghouse #15926)

This action concerns special education practices in all Rhode Island school systems and several state institutions. After several weeks of trial, stipulations were entered which resolve the case, at least temporarily. In one group of stipulations, plaintiffs agreed to dismiss the action, without prejudice, by June 1, 1976, if there is substantial compliance with certain agreements. These agreements, most of which are to be effectuated by local systems following receipt of memoranda from the State Commissioner, concern: (1) utilization of a particular definition of mental retardation ("...abnormal in adaptive behavior and further...an IQ of below 70 on an individually administered intelligence test after adjustment for socio-cultural bias"); (2) reevaluation of black and non-English dominant students who are in classes for the mentally retarded; (3) basing placement in special classes on parental consent; (4) provisions for due process procedures "any time that a decision substantially altering the educational placement of a handicapped child is intended..."; (5) creation of a special education unit in the State Department of Education "to monitor compliance with state law, regulations and these stipulations"; (6) determining "the number of children with emotionally based and neurologically based problems" attending secondary schools and providing adequate programs for them; (7) designing and implementing "a referral system whereby those pupils with suspected handicapping conditions will be brought to the attention of appropriate school personnel for diagnostic work-up"; (8) a program of identifying and serving handicapped children ages 3-6. The stipulations require numerous progress reports to plaintiffs' counsel. Separate stipulations, with similar provisions for dismissal based upon substantial compliance, concern the Home School of the Patrick O'Rourke Children's Center, the Institute of Mental Health, the Ladd School and Zambarano Hospital. These agreements cover, inter alia, the following: (1) employment of personnel and their qualifications; (2) adequate evaluations of students; (3) development of individual educational plans for students and periodic evaluations of progress; (4) number of hours of instruction; (5) an overall assessment of the educational program at the Institute by independent persons; (6) additional classroom space; (7) a report on steps taken to provide alternatives to institutionalization at the Ladd School; (8) evaluation of compliance with certain provisions by a panel of experts. These agreements also provide for reports to plaintiffs' counsel.

ELB

RISAC v. Board of Regents, C.A. No. 5081, D.R.I., Mem. Op., 8/1/75

Pre-trial rulings in case involving challenge to education of students with special needs in all Rhode Island school systems and several state institutions. Ruling: "[T]he statute [29 U.S.C. 794] should be applied to correct discriminatory practices in any federally assisted program regardless of whether it is a vocational rehabilitation program or not." (p. 8) (Defendants had argued that §794 applied only to "vocational rehabilitation programs.")

ELB

See Part VI.A.2. infra.

IV.D. Other Cases Challenging Inadequate Educational Programs for Handicapped Children

Mentally Disabled School Children in Philadelphia Challenge School District's Failure to Provide Them Special Programs and Classes

16,905. Frederick L. v. Thomas, No. 74-52 (E.D. Pa., filed Oct. 10, 1975). Plaintiffs represented by David Kraut, Stephen Gold, Community Legal Services, Inc., Sylvania House, Juniper and Locust Sts., Philadelphia, Pa. 19107, (215) 893-5300; Stephen Miller, Education Law Center, Lewis Tower Bld., 15th and Locust Sts., Philadelphia, Pa. 19102. [Here reported: 16,905A Complaint (13pp.); 16,905B Memo in Support of Motion to Dismiss (15pp.); 16,905C Memo in Support of Motion to Dismiss (3pp.); 16,905D Memo in Opposition to Motion to Dismiss (37pp.); 16,905E Supplemental Memo to Motion to Dismiss (15pp.); 16,905F Plaintiff-Intervenor's Supplemental Memo (10pp.).]

This class action filed on behalf of all students within the School District of Philadelphia who have learning disabilities, challenges the School District's failure to provide special programs and classes for such children. Defendants are the School District of Philadelphia, the individual members of the Philadelphia Board of Education, the Pennsylvania Secretary of Education and the Pennsylvania Attorney General. Plaintiffs contend that although children with learning disabilities are not per se physically excluded from attending classes in the School District of Philadelphia, such children are effectively excluded in that they are unable to learn unless they receive special educational services.

Plaintiffs' arguments include the right to equal protection, the constitutional right to a minimally adequate education, abstention, mootness, and pendent state claims involving the Pennsylvania Public School Code of 1949, 24 P.S. §§13-1371 *et seq.* They seek declaratory and injunctive relief.

CR

Frederick L. v. Thomas: Equal Protection and Minimally Adequate Education.

In denying defendants' motion to dismiss in this case, Judge Newcomer in a Memorandum and Order (pp. 4-7) dated January 7, 1976 stated, inter alia:

The complaint alleges that in the School District of Philadelphia, children with specific learning disabilities who are not receiving instruction specially suited to their handicaps are being discriminated against in the following respects. First, the Commonwealth and School District are providing "normal" children with a free public education appropriate to their needs, but are denying an equal educational opportunity to the plaintiffs. Admittedly, most of the plaintiffs are afforded access to the

same curriculum as normal children, but it is argued that the test of equal treatment is the suitability of the instructional services for the educational needs of the child. Many of the plaintiffs, it is said, cannot derive any educational benefit from the normal curriculum if that experience is not mediated by special instruction aimed at their learning handicaps. We are told that inappropriate educational placements predictably lead to severe frustration and to other emotional disturbances which impede the learning process and erupt into anti-social behavior. On this basis it is argued that some or all of the class is constructively excluded from public educational services, because -- for them -- the instruction offered is virtually useless, if not positively harmful.

Whether the plaintiffs are to be deemed "excluded" from public education is, we think, a mixed question of fact and law. We note that the Supreme Court, in Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786, 38 L.Ed. 2d 234 (1974) did not reach the question whether non-English speaking Chinese children were, for the purposes of equal protection analysis, being constructively excluded from public educational services when they were admitted to the schools on the same basis as other children, that is, into classes conducted only in English. Furthermore, in San Antonio School District v. Rodriguez, 411 U.S. 1, 37, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973), the Court left open the possibility that the denial of a minimally adequate educational opportunity may trench upon a fundamental interest, if the state has undertaken to provide a free public education.[4] We find that the plaintiffs' legal prop-

4. This minimum education equal protection theory is distinct from the plaintiffs' right-to-education claim based on the First, Ninth, and Fourteenth Amendments. The latter theory would impose on the state an absolute duty to provide the minimal educational services necessary to prepare children for democratic citizenship in their adult lives.

ositions are not completely devoid of merit, and that their offer of proof on the factual question is satisfactory. Plaintiffs may be able to show that the defendants' policies must be subjected to strict scrutiny because a classification has functionally excluded them from a minimally adequate education.

Second, the plaintiffs say that the Commonwealth and the School District of Philadelphia are providing mentally retarded children with a free public education especially suited to their individual needs, but are denying learning disabled children an equal educational opportunity, namely, a curriculum adapted to overcome their handicaps.

Third, it is alleged that the state and the district are unlawfully discriminating between those few learning disabled children who it is specially instructing, and the plaintiffs who are not given special instruction.

The complaint also includes a colorable claim that these classifications do not satisfy the equal protection test of rationality. The appropriate test for this case would not be the traditional rationality standard. See, e.g. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 55 L.Ed. 369 (1911). The interests implicated in this dispute require the defendants to show that their actions have a basis in fact which rationally advances an actual purpose of the legislative scheme. Weinberger v. Weisenfeld, 43 L.Ed. 2d 514 (1975); Sosna v. Iowa, 95 S.Ct. 553 (1975); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); See also, Gunther, "Forward: In Search of An Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972); Davidson, "Welfare Cases and the 'New Majority': Constitutional Theory and Practice," 10 Harv. Civ. Rights-Civ. Lib. L. Rev. 513 (1975).

Weisenfeld, supra, involved a classification by sex, a quasi-

suspect classification. Analogously, the instant case involves education, a quasi-fundamental interest.[5] Moreover, although learning disabled children are not a suspect class they do exhibit some of the essential characteristics of suspect classes-minority status and powerlessness. We think that the Supreme Court, if presented with the plaintiffs' equal protection claim, would apply the as yet hard to define middle test of equal protection, sometimes referred to as "strict rationality." For example, in Weinberger, supra, the Court, without purporting to apply the compelling state interest test, noted that a legislative discrimination, even if it can be rationally explained and "is not entirely without empirical support," 43 L.Ed. 2d at 523, must nevertheless withstand scrutiny in light of the primary purposes of the legislative scheme of which it is a part.

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5. As we have said, the Supreme Court has not ruled out that complete denial (by a state which has created a public school system) of a minimally adequate education may involve a fundamental interest.

Fialkowski v. Shapp, C.A. No. 74-2262, E.D.Pa., Mem. and Order, 12/17/75 (Clearinghouse No. 17,499)

Action on behalf of two multiply handicapped persons alleging a denial of equal protection "because unlike the programs offered to normal and less severely retarded children, the nature of the educational programs offered them is such that no chance exists that the programs will benefit." The defendants are Philadelphia officials, and four state officials, two in the education area and the governor and former attorney general. Rulings (on motion to dismiss): (1) The commissioner of education and the director of the Right to Education office are proper defendants because they "had direct supervisory control over the policies of the local school district." (Slip. Op., p. 6) The governor and the attorney general are dismissed as defendants because they were not aware of plaintiffs' situation, they committed no overt acts, and they had no direct supervisory control. (p. 11) (2) The Eleventh Amendment does not bar monetary relief against the individual defendants in their personal capacities. (p. 3) (3) "In order to prevail on their claim of immunity, defendants must allege and establish on the record a good faith defense as articulated by the Court in Wood [v. Strickland, 420 U.S. 308 (1975)]. Such a determination cannot be made on the basis of the allegations in the complaint." (p. 15) (4) Plaintiffs were not required to exhaust the remedies provided in the PARC consent decree, 343 F.Supp. 279 (E.D.Pa., 1972) since (a) "[t]he Supreme Court appears to have treated the law as settled that the exhaustion...doctrine is not applicable when an otherwise good cause of action is brought under §1983" (pp. 15-16), and (b) the asserted remedy is not adequate (no right to compensatory damages, or to test adequacy of program). (pp. 16-18) (5) "...Rodriguez does not foreclose plaintiffs' equal protection claim." (a) Plaintiffs allege a complete denial of educational opportunity rather than a lesser quality of education. (p. 19) (b) Plaintiffs seek "equal access to minimal educational services" rather than "equal financial expenditures." (pp. 19-20) (c) There is "a certain immediate appeal" to the contention that under Rodriguez, 411 U.S. at 28, retarded children are a "suspect class." (pp. 20-21) (6)"[T]here may be no rational basis for providing education to most children and yet denying plaintiffs instruction from which they could possibly benefit." (p. 21) (7) The court withholds a ruling on plaintiffs' right to treatment claim. (p. 21 at n.10)

ELB

Note: Judge Huyett also distinguishes between exclusion from school and exclusion from education: "Although the PARC procedural safeguards may prevent total exclusion from school, they may not be adequate to prevent total exclusion from education." (p.18).

Fialkowski v. Shapp: Handicapped Children as a Suspect Class

Judge Huyett's Memorandum (p.20) includes the following discussion of handicapped children as a possible suspect class:

[P]laintiffs argue that we should strictly scrutinize their claims because retarded children are a suspect class. Reviewing the characteristics of a suspect class as the Supreme Court has identified them, we find a certain immediate appeal to plaintiffs' argument. The Court in Rodriquez, for example, set forth the following criteria for determining what constitutes a suspect class:

> [a] class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 411 U.S. at 28.

Such a test could certainly be read to include retarded children. Retarded children are precluded from the political process and have been neglected by state legislatures.[9] Moreover, the label "retarded" might bear as great a stigma as any racial slur. In Interest of G.H., 218 N.W. 2d 441 (1974), the Supreme Court of North Dakota accepted the argument that the handicapped should be classified as suspect and distinguished Rodriguez on this basis.

> While the Supreme Court of the United States, using the "traditional" equal-protection analysis, held that the Texas system of educational financing, which relied largely upon property taxes, was constitutional, we are confident that the same Court would have held that GH's terrible handicaps were just the sort of "immutable characteristics determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy. 218 N.W.2d at 446-47.

9. For example, until the last two years, retarded children have been universally denied admittance into public schools in the United States. In addition, thirty-two states have had statutes providing for the sterilization of retarded individuals. O'Hare & Sanks, Eugenic Sterilization, 45 Geo L. J. 30 (1956).

Suit Alleging Failure to Provide Adequate Special Education Program for Emotionally Handicapped Children Dismissed for Lack of Jurisdiction

16,468. Wilson v. Redmond, No. 75-C-383 (N.D. Ill., Aug. 19, 1975). Plaintiffs represented by James DeZelar, Legal Assistance Foundation of Chicago, 1114 S. Oakley Blvd., Chicago, Ill. 60612, (312) 421-2061. [Here reported: 16,468A Opinion (5pp.).]

The court has dismissed for lack of subject-matter jurisdiction, plaintiff's complaint which alleged that emotionally handicapped children in Chicago, Illinois were not being provided an adequate special education program. Relying on *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972), the court stated that education is not among the rights explicitly or implicitly protected by the constitution, and therefore the court has no jurisdiction under Section 1983 and 28 U.S.C. §1343. Had plaintiff alleged that defendants completely denied handicapped children the right to an education, rather than merely alleging that handicapped children are afforded a different quality of education than other children in Chicago, the court indicated its decision might be different since the claim would have fallen into the "complete deprivation" exception hinted at in *Rodriguez*.

The court also indicated that its decision might have been different if plaintiff had alleged that the state and county officials had implemented a special education program that failed to provide equal treatment for handicapped children in Chicago. "The question then would have been not whether the state is constitutionally required to provide a 'minimally adequate' education for handicapped children, but whether, after the state adopts a law for the establishment and maintenance of special education facilities, it is required to insure equal application of that law to all persons in the state. The answer to the latter inquiry is clearly in the affirmative." The court also held that plaintiff's claim is not an appropriate subject for due process analysis.

CR

Doe v. Laconia Supervisory Union No. 30, 396 F.Supp. 1291 (D.N.H., 1975)

Action by emotionally handicapped student against local school system and members of state board of education for cost of tuition at private school. N.H.RSA 186-A:8 provides in part: "The state board of Education shall be responsible for any tuition cost which exceeds the state average cost per pupil of current expenses." Payment was refused when plaintiff was placed "in a fourth priority status" under a priority status adopted due to insufficient legislative funding. The priority system was based on "the severity of the handicap." Rulings: (1) The court does not have jurisdiction over the Supervisory Union. This entity cannot be sued under 28 U.S.C. 1331 (citing cases), and "plaintiff has not made a prima facie showing" of satisfying the $10,000 jurisdictional amount requirement of 28 U.S.C. 1331. (1293) (2) Since neither a fundamental right, nor a suspect classification is involved, the priority system must be judged by the rational basis standard. (1296) (3) In challenging the rationality of the priority scheme, plaintiffs note that the limited funds would be stretched further if the economic status of families were also considered. While agreeing that "the interests and goals of [the statute] might be better furthered" if defendants followed plaintiff's suggestion, the court holds that "the present scheme of administration cannot be 'condemned simply because it imperfectly effectuates the State's goals.' Rodriguez, supra, 411 U.S. at 51...." (pp. 1297-98) The court also holds that "there is a rational basis for giving those children with the severest handicap preferential treatment...." (1298) (4) The court rejects the contention that the state computes the "state average cost per pupil" in an unconstitutional manner.

ELB

Halderman v. Pittenger, 391 F.Supp. 872 (E.D. Pa., 1975)

Class action on behalf of children with special educational needs challenging, on equal protection grounds, Pennsylvania laws (24 P.S. 13-1376, 1377) setting maxima for state reimbursement of the cost of "special education" in private schools. Plaintiffs allege

that they attend private schools where the cost exceeds the maximum reimbursement levels. Rulings: (1) With respect to the jurisdictional amount, in cases "where there is no adequate remedy at law, the measure of jurisdiction is the value of the rights sought to be protected...." (873). Here, the rights asserted are such as to satisfy jurisdictional requirements. (2) "[P]laintiffs' claims, whether they can be sustained or not, are sufficiently substantial as to require the convening of a three-judge court." (876)

Note : In dicta, the court expresses skepticism about the validity of the plaintiffs' claim.

ELB

Kruse v. Campbell, C.A. No. 75-0622-R, E.D.Va., Complaint, 12/1/75

Class action on behalf of learning disabled pupils challenging (a) Virginia's system of tuition assistance grants to parents of handicapped students who must be enrolled in private special education programs because of the absence of appropriate public school programs, and (b) a related welfare department practice. The named parent plaintiffs allege that the maximum grants authorized by statute -- Virginia Code Section 22-10.8 (1975 Supp.) -- do not cover the full costs of the private facilities in which they must enroll the minor named plaintiffs because of the lack of appropriate programs in the Fairfax County system in which they reside, and that they are poor and unable to pay the difference. In addition, plaintiffs allege that the welfare department will only pay the full cost of appropriate private education if custody of children is relinquished and they are placed in residential facilities. The defendants are the chief administrative officers of state and local education and welfare departments. Plaintiffs contend in part that the challenged practices deny equal protection of the laws, and are inconsistent with the Federal Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. (See VI.A. infra.) Plaintiffs seek in part the convening of a three-judge court, declaratory relief, and an order requiring payment of the full cost of private education, without unreasonable conditions.

Hernandez v. Porter, C.A. No. 571532, E.D.Mich., First Amended Complaint (Clearinghouse #16272A)

Class action on behalf of Latino students initially misclassified as retarded and placed in special classes due to lack of sensitivity to and capacity to deal with language barriers, and ultimately returned to regular classes without adequate provision for overcoming the effects of placement for years in special classes. The complaint seeks, inter alia, damages, opportunities for adequate reevaluations of Latino students placed in special

classes, reintegration of misclassified students in regular classes with "at least one Latino tutor or helper for each person seeking to be reintegrated into regular school classrooms," correction of student records, and a determination that certain Michigan laws, deemed to bar adequate remedial programs, are unconstitutional. The complaint states claims based upon the fourteenth amendment, 42 U.S.C. 2000d and 20 U.S.C. 1703(f).

ELB

ADEQUATE EDUCATIONAL PROGRAMS FOR HANDICAPPED CHILDREN REQUIRED BY NEW YORK LAW

In re Reid (No. 8742, N.Y. State Commr. of Ed., decision dated 11/26/73), Clearinghouse No. 9376.

This class action on behalf of an estimated 24,000 handicapped children in New York City was initially brought in federal court, but the Second Circuit upheld the district court's abstention from deciding the federal claims until state claims were decided in state court. *Reid v. Board of Education,* 453 F.2d 238 (2 Cir. 1971). Plaintiffs then raised the state law claims in an administrative proceeding before Ewald B. Nyquist, Commissioner of Education, State of New York. In an opinion handed down on November 26, 1973, the Commissioner provided relief to a class which includes all handicapped children in the City of New York "who are either attending private or public schools or for whom the respondents do not provide suitable educational facilities or programs." The Commissioner's findings are as follows:

"I find that a class appeal is properly brought in this matter, in that there are admittedly numerous children residing within the respondent district whose educational needs are not being adequately served, as required by section 4404 of the Education Law, which provides, in part:

> The board of education of each school district in which there are ten or more handicapped children who can be grouped homogeneously in the same classroom for instructional purposes shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments of such children from their fifth birthday until the end of the school year during which they attain their twenty-first birthday, or shall contract with the board of education of another school district, a board of cooperative educational services or a vocational education and extension board for the education of such children, under regulations to be established by the commissioner of education.

Parts 101, 200 and 203 of the Regulations of the Commissioner of Education provide for implementation of this requirement.

"The Department's investigations have shown several areas in which the respondents have not carried out their obligations set forth in the law and regulations. In particular, I find that the following deficiencies have existed and continue to exist:

1. Undue delays in examinations and diagnostic procedures.
2. Failures to examine and diagnose handicaps.
3. Failures to place handicapped children in suitable programs.
4. Failures to provide available space and facilities for programs.
5. Children placed on home instruction in violation of the purpose of home instruction.
6. Children placed on home instruction who did not receive the required hours of personal instruction in accordance with the regulations of the Commissioner of Education.
7. Handicapped children expelled from public school education for

medical reasons when such medical reasons did not preclude benefits from educational settings.

8. Incomplete or conflicting census data on the number of handicapped children residing in New York City.
9. Inadequate means of informing parents of the processes related to special education services, and inadequate plans for parent involvement in effective planning and decisionmaking regarding their children.
10. Suspensions of handicapped children from classes without adequate notice or provisions for alternate educational services.

"With regard to failures by the respondents to examine and diagnose handicapped pupils, I have found that a 'Medical Discharge Register' has been established by the respondents and used as a substitute for providing services for children with handicaps and discipline problems."

"Section 4404 of the Education Law clearly expresses the public policy of this State that all handicapped children be provided with adequate educational services. The respondents have, in many instances, resorted to home instruction instead of providing adequate classroom facilities for the handicapped."

"Respondents' failure to provide adequate educational programs for handicapped pupils results in large part from their failure to provide adequate physical facilities and staff for the needed services. Again the law is clear that the respondents must provide the required facilities and staff or contract with private agencies in accordance with paragraph b of subdivision 2 of section 4404 of the Education Law."

As a result of these findings, the Commissioner issued an order directing the Board of Education and the Chancellor to immediately place all diagnosed handicapped students in public school classes or private schools under contract with the Board, to discontinue illegal suspensions and use of the illegal "medical discharge register," to only use home instruction in accordance with law, to cease home instruction as an alternative to classroom education and to submit lists and plans before February 1, 1974 on children on home instruction, on elimination of waiting lists for diagnosis and placement, on meeting the needs of all handicapped and on notifying parents and interested persons, in a language they understand, on available services for handicapped children.

16 Inequality in Education at pp.61-62.

Handicapped Children Challenge Quality of Special Education

17,342. McWilliams v. New York City Board of Education, No. 21350-75 (N.Y. Sup. Ct. App. Div., filed Jan. 21, 1976). Petitioners represented by Gene Mechanic, Michael Dale, The Legal Aid Society, Juvenile Rights Division, 189 Montague St., Brooklyn, N.Y. 11201. [Here reported: 17,342A Petition (29pp.); 17,342B Order to Show Cause (5pp.); 17,342C Order (2pp.); 17,342D Order (3pp.); 17,342E Appellants' Brief (30pp.).]

Petitioners, representing a class of "handicapped" children assigned to "special classes" under the jurisdiction of the Board of Education of the City of New York, challenge the quality of education they are receiving. Under 8 N.Y.C.R.R. §200.1(d), a "special class" is defined as "a class containing handicapped children who have been grouped together because of similar education needs for the purpose of being provided a program of special education under the direction of a specially trained teacher."

Petitioners allege that special classes in New York City are undergoing substantial change. The number of teachers and para-professionals working in the classes has been severely reduced, and ancillary services such as speech and hard-of-hearing therapy and psychotherapy are all but nonexistent. Despite the staff cuts and lack of ancillary services, the Board of Education has received a "variance" from the Commissioner of Education allowing it to increase registers in special classes to 20 percent over the maximum sizes established for special classes under state regulations. Petitioners claim that the staff-pupil ratio in special classes vastly exceeds that essential for suitable education, thereby violating state constitutional and statutory rights. They allege that respondents' actions have ignored established educational standards and have negated the reason for their segregation from the regular school classes: to receive individual attention suitable to their needs.

CR

STATE COURT ORDERS APPROPRIATE EDUCATIONAL PROGRAMS FOR RETARDED CHILDREN

Maryland Association for Retarded Children v. *State of Maryland* (Equity No. 77676, decision filed April 9, 1974).

The Maryland Circuit Court for Baltimore County has ruled in *Maryland Association for Retarded Children* v. *State of Maryland* that Article 59A and Sections 73, 99 and 106D of Article 77 of the Annotated Code of Maryland requires the State and local education authorities "to provide a free education to all persons between the ages of five and twenty years, and this includes children with handicaps, particularly mentally retarded children, regardless of how severely and profoundly retarded they may be." The State Court, hearing the case pursuant to the abstention order of a three-judge federal court, held that Article 77 requires local educational authorities to determine "that the educational program provided for a child is in fact an *educational* program and that it is in fact an *appropriate* program for the child."

> The obligations referred to above cannot be discharged by referral of a child to another governmental authority or to a nonpublic school or facility if no opening in programs provided by such other agency or school or facility are available for the child and as a consequence the child cannot be enrolled but instead must wait on a waiting list for an opening.
>
> Home and hospital instruction is not an appropriate long-term educational arrangement for any child....Mental retardation, however profound, is not a "physical" condition justifying referral to home and hospital instruction in lieu of instruction in school.
>
> The practice of sending children to nonpublic schools without full funding when the public schools are unable to provide the child with a program is unlawful. If the state fails to provide full funding in any such case the local board of education is obligated to do so. When the public schools provide or arrange for the education of a child in a public institution the *educational* program must be made available without charge to the child and his parents or guardians. The state has an obligation under Article 59A and Article 23 of the Declaration of Rights to fund institutional educational programs that insure appropriate education, so that there is no discrimination against children in the institutions.

In addition, the Court ordered that all educational programs, including state operated residential facilities, must meet accreditation standards to be promulgated by the State Department of Education. "The standards must be promulgated by September 1, 1974 and compliance with the standards must be effected by September 1, 1975. It is the primary obligation of the State of Maryland to provide for such funding as may be necessary to insure compliance with the appropriate standards."

All parties to the litigation agreed that all children can be benefitted by some type of program of service, no matter how severely retarded. In an Explanatory Memorandum of Decision filed April 9, 1974, Judge John E. Raine, Jr. held that the "education" required to be provided by state law must be broadly defined: "...education is any plan or structured program administered by competent persons that is designed to help individuals achieve their full potential....Every type of training is at least a sub-category of education." Under Maryland law, the Mental Retardation Administration must assume responsibility for appropriate educational programs where the retardation is so severe that there is no program available in the public school system. Noting that the "chief reason why the State's responsibility to the mentally retarded had not been properly discharged is inadequate funding," Judge Raine concluded: "The main thrust of the decree will be to place joint responsibility on the Mental Retardation Administration and the State Department of Education for the education of the mentally retarded, and to declare that the State of Maryland has the obligation to provide the necessary funding."

Plaintiff represented by Robert Plotkin, NLADA National Law Office, 1601 Connecticut Avenue, N.W., Washington, D.C. 20009; J. Snowden Stanley, Jr., 10 Light Street (17th Floor), Baltimore, Maryland 21202; Albert S. Barr, III, 25 South Charles Street, Baltimore, Maryland 21202; and Ralph J. Moore, Jr., 734 Fifteenth Street, N.W., Washington, D.C. 20005.

17 Inequality in Education at pp. 61-62.

McNeil v. Board of Education of Orange and Maplewood, No. L-17297-74, N.J. Superior Ct., Essex County, Amended Complaint (Clearinghouse No. 17,508)

Action by graduate of public school system alleging that he "demonstrated a severe reading problem" upon entering the system in 1965, that he was "socially promoted," and that he "never learned to read beyond a second grade level...." The defendants are the board of education, the superintendent, two principals, a social worker, three physicians, three psychologists, a learning disability specialist, and other persons presently unknown. The complaint further alleges that two of the physicians "negligently failed to properly examine, diagnose, consult and treat the plaintiff's disability" and that the other defendants "negligently, and in violation of statutory duties failed to properly identify, classify, examine, diagnose, consult, treat and educate the plaintiff...." The defendants have sought summary judgment based upon asserted non-compliance with notice requirements of New Jersey's Tort Claims law.

ELB

IV.E. Bilingual Cases

This section on bilingual cases is included for purposes of analogy with inadequate programs for handicapped children. For more detailed case discussion and other materials on bilingual education, see Bilingual-Bicultural Education: A Handbook for Attorneys and Community Workers (December 1975), available from the Center for Law and Education.

IV.E.1. *Lau v. Nichols*

FEDERALLY FUNDED DISTRICTS MUST PROVIDE SPECIAL LANGUAGE PROGRAMS FOR NON-ENGLISH SPEAKING STUDENTS

Lau v. *Nichols*, 42 U.S. Law Wk. 4165 (January 21, 1974).

The United States Supreme Court has ruled that San Francisco's failure to take affirmative steps to meet the language difficulties of 1800 non-English speaking Chinese students constitutes a violation of Title VI of the Civil Rights Act of 1964. The students had brought suit alleging denials of Equal Protection and Due Process as well as the statutory violation. The District Court and Court of Appeals denied relief finding that the students' language deficiencies were not caused by the state and hence there was no constitutional right to special language programs. The Supreme Court reversed, finding that Title VI, which bars discrimination in federally assisted programs, requires affirmative steps to bring non-English speaking students into the educational mainstream. The Court said: "Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."

The significance of the *Lau* case will not become clear until there is some experience on a district-by-district level. And at least two limitations in the Court's opinion may serve to diminish its impact. By ruling on the statutory claim only, the Court geared relief to school districts which desire to receive federal funds. Some districts may prefer to forego federal financial assistance rather than enact a language program. Also, the Court left open the kind of language program required. Thus efforts to secure high quality bilingual-bicultural programs may still turn in many instances upon negotiation.

16 Inequality in Education 58 (March 1974)

QUALITY BILINGUAL EDUCATION THROUGH LAU?

The Supreme Court's decision in *Lau* v. *Nichols*, 414 U.S. 563, *94 S. Ct. 786 (1974)* has been widely greeted by advocates of bilingual-bicultural education as a landmark in the effort to secure equal educational opportunity for non-English speaking minority children. However, as indicated in the note on *Lau* in *Inequality in Education*, #16, March 1974 (p.58), the Court's opinion was narrowly drawn. It left unanswered some practical questions which are essential if quality bilingual-bicultural education is to become a reality.

The *Lau* decision rested on section 601 and section 602 of the Civil Rights Act of 1964 and the HEW regulations promulgated under that section. Thus, on the narrowest construction, the decision stands simply for the proposition that the HEW guidelines involved were "entitled to great weight" as the consistent and reasonable interpretation of the department charged with administering Title VI. And while Title VI does provide a weapon for plaintiff-litigants, the limitations on relief through the statute could have been avoided had the Court ruled on the Equal Protection claim.

Administration and interpretation of the Civil Rights Act of 1964 has, from its inception, been subject to the bureaucratic and political winds which blow at HEW. Actual enforcement of Title VI through hearings and cut-offs has been the exception, negotiation seemingly endless. *See*, for instance, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *Lau* v. *Nichols* does make clear at the Supreme Court level that individual plaintiffs may sue to enforce the provisions of Title VI without waiting for HEW to act. On the other hand, to the extent that the definition of discrimination for Title VI purposes is whatever HEW says

it is, then one must always be looking over its shoulder to make certain that standards are not changing. In view of its strong support for the regulations involved in *Lau* (the United States advanced the Title VI argument in the Supreme Court), it seems very unlikely that HEW could or would backtrack on the position that school districts must "take affirmative steps to rectify [the] language deficiency," 35 Fed. Reg. 11595 (1970). However, lawyers who seek to apply Title VI to new situations, extending the current interpretations of the regulations, or who desire a friendly court appearance by HEW may be disappointed by the difficulty of obtaining swift and progressive decision-making by the agency.

One reading of *Lau* may provide help in dealing with some aspects of this problem. The HEW regulations upheld by the Court were of two varieties: broadly worded regulations which amplified the ban on discrimination in the use of federal funds found in Title VI, and an interpretive guideline specifically requiring affirmative steps to correct language deficiencies of non-English speaking students. The Court first quoted from the more general language of 45 C.F.R. sec. 80.3(b)(1), 80.5(b) and 80.3(b)(2). For instance, sec. 80.3(b)(1) says that recipients of federal aid may not "restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program," nor may it "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," 80.3(b)(2). The Court concluded that it " . . . seems obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the Regulations." The court then describes the 1970 HEW guidelines which specifically require affirmative language programs, 35 Fed. Reg. 11595. The opinion can be read as applying the broad anti-discrimination language of sec. 80.3 ff. directly to the fact situation of a large number of non-English speaking children being functionally excluded from educational benefits. On this reading the more specific 1970 clarifying guideline material would not be essential to the decision and thus it may be possible to press claims of discrimination which are as yet uncovered by specific HEW guidelines. Support for this reading can be found in the separate opinion of Mr. Justice Stewart, concurring in the result, who views the 1970 guidelines as central to a finding of discrimination.

Beyond the question of what kinds of discriminatory activity are reached by Title VI lies the harder issue of relief. Title VI prohibits discrimination in federally assisted programs. It does not, of course, require a local school district to participate in these programs. Some districts, particularly small rural districts which have a large number of non-English speaking children and receive a small amount of federal funds, may decide (on cost or ideological grounds) to forego federal funds rather than institute a language program. Since the most likely source of federal money in such districts is the Elementary and Secondary Education Act's Title I or Title I Migrant programs, the effect of a decision to give up federal funding would be to deprive poor children of whatever meager benefits they are already getting from these programs. A second possibility is that such districts will simply rewrite their Title I applications to make correction of language problems a goal of their Title I programs. This would raise the critical and difficult question of the quality of programs required by *Lau*.

In larger districts (such as the San Francisco district), the threat of a loss of federal funds is likely to be a greater inducement for the initiation of programs. Even here one should be careful to argue that poor and minority students are not the only ones to suffer the loss of federal funds when a school district is found to be practicing discrimination in its school program. In *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Court seemed to limit the cut-off power of HEW to specific federal grants infected with prohibited discrimination rather than to all federal funds received by the offending school district. Although the issue of *which* federal funds may be cut-off was never presented in *Lau*, it would seem that the exclusion of non-English speaking children from basic educational benefits must necessarily limit the ability of such children to participate in all phases of public school life in their district. The Fifth Circuit in *Taylor County* did indicate that "[t]o say that a program in a school is free from discrimination

because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position," *supra*, 1079. The burden should be on school districts to show that the discrimination found in one federal program could have no effect on the participation of minority students in other federally assisted programs.

The problem of relief is not confined to the cut-off issue. Hopefully most school districts will comply with *Lau* rather than lose federal funding. The real question is what kinds of language programs will be required under *Lau*. Unfortunately the decision itself is of little help. The Court specifically eschews requiring any particular type of program, stating that "[p]etitioner asks only that the Board of Education be directed to apply its expertise to the problem and rectify the situation." For many minority students the application of such "expertise" will yield programs which have little to do with *quality* bilingual-bicultural education. Since decades of discrimination (including failure to provide language instruction) have resulted in a disproportionately low number of available minority teachers, many districts will not be in a position to institute meaningful programs. Furthermore, unrealistic certification qualifications also operate to exclude potential minority teachers. The result, if districts are to rely on their existing teaching staffs to provide special language programs, may be a giant hoax on non-English speaking children. From the lawyer's perspective, however, that hoax may be virtually unassailable in court.

For example, suppose a district adopts a program entitled "Language Difficulty Correction Program" which centers on a few of its Anglo teachers receiving some extra training at a local teachers' college. Suppose further that the district is able to write a program description in suitable educational jargon and obtain the services of some "educators" who will testify that this is a bona fide program to help non-English speaking children. It is not certain that such a program would fall short of the *Lau* requirements and it is highly likely that most judges will not want to rule on what constitutes the best method of teaching non-English speaking children. Indeed the question of teaching methodology is one which courts have always sought to avoid. Thus advocates of bilingual-bicultural education may want to have a firm idea as to what kinds of programs they can secure from a local district before they move forward and demand relief under *Lau*. (It is possible, of course, that HEW may issue further interpretative guidelines which specifically require teaching of all courses in the child's home language. Interested persons might do well to write the Office for Civil Rights and urge the adoption of strong requlations on this question.)

Finally, *Lau* may provide some direction for other kinds of education cases in its use of state education statutes and policies as relevant to a finding of unequal treatment. The Court reviewed the California statutes which mandated proficiency in English as state policy and concluded that: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Undoubtedly other acts of discrimination may be cast in terms of effective foreclosure from the purposes of the state's education statutes and policies and use of such state materials may be helpful in obtaining relief under Title VI.

17 Inequality in Education at 64-66

IV.F. Failure to Teach Basic Academic Skills in Regular Classes: *Peter Doe*

DAMAGE ACTION BY ILLITERATE HIGH SCHOOL GRADUATE DISMISSED

Doe v. *San Francisco Unified School District*, No. 653-312, Cal. Super. (1974)

Without a written opinion, the State Superior Court on November 14, 1974 dismissed *Peter Doe* v. *San Francisco Unified School District*, a damage action charging the public school district with negligence and educational malpractice in graduating an illiterate high school student. The court sustained the demurrer filed by the defendants which argued that the public school district was immune from tort liability for the negligent or tortious conduct of employees with respect to 'academic' subjects. The school district argued that its tort liability was limited to the protection of students from physical harm and that to extend tort liability to negligent teaching in areas such as reading would render public education economically unfeasible. The district argued that the charges that the school district violated various statutory duties in their operation of the public schools, if true, did not give rise to a liability in damages for such violations. They further argued that an interest in learning to read was not cognizable under tort law. Finally, the district argued that it owed no duty to any individual students to teach them to read or learn any other particular subject.

In response, the plaintiff asserted that the school district, by compelling students to attend school under the State's compulsory attendance laws, had assumed the duty to exercise reasonable care in teaching and that a breach of the duty to exercise reasonable care was actionable. The argument was also made that the California governmental tort liability for educational negligence and without a specific exemption, defendant's claim of immunity was invalid. Plaintiff also argued that violation of mandatory duties under the Education Code gave rise to action in damages under specific California statutes and that a student's interest in learning how to read—an expectancy—was an interest cognizable under tort law.

Finally, the plaintiff argued that the action did not claim that the school district had an absolute duty to teach the plaintiff how to read, but, rather, it had a duty to exercise *reasonable care* in discharging its functions and the district and its employees had failed to observe an appropriate standard of care with respect to the plaintiff. Since the action was based upon the notion of fault—negligence—rather than strict liability, plaintiff asserted that defendant's claim of bankrupting the school system by actions from non-learners were meritless.

An appeal of the dismissal has been filed with the California Court of Appeals.

Susanne Martinez*

* Susanne Martinez is a Staff Attorney at the Youth Law Center, San Francisco.

From 19 Inequality in Education (Feb. 1975) at 57-58.

See also Stephan Sugarman, "Accountability through the Courts," 82 School Review 233 (February 1974); Gershon Ratner, "Remedying Failure to Teach Basic Skills," 17 Inequality in Education 15 (June 1974); David Abel, "Can a Student Sue the Schools for Educational Malpractice?" 44 Harvard Educational Rev. 416 (Nov. 1974).

V. Tracking

V.C.6. Other Cases Challenging Ability Grouping Practices

McNeal v. Tate County Sch. Dist., 508 F.2d 1017 (C.A. 5, 1975)

Challenge to classroom segregation in Tate County Mississippi system resulting from placement based on teacher evaluation of past performance, a method used for ten years. The three elementary schools (grades 1-6) had from one to four all-black sections and there were a few all-white sections in advanced grades. While approving this scheme, the district court found that "[i]t might well be that the segregated classrooms exist 'because the black child has not had the advantages which the white child has had.' " (1019) Rulings: (1) "[T]he court must assay the present district plan of student assignment which results in racial segregation with a punctilious care, to see that it does not result in perpetuating the effects of past discrimination. Certainly educators are in a better position than courts to appreciate the educational advantages or disadvantages of such a system in a particular school or district. School districts ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect. If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities." (1020) (2) Case reversed and remanded for system to have opportunity to meet its evidentiary burden or submit another plan. (1021) (3) A legally adequate plan should be effective as of September, 1975. (1021)

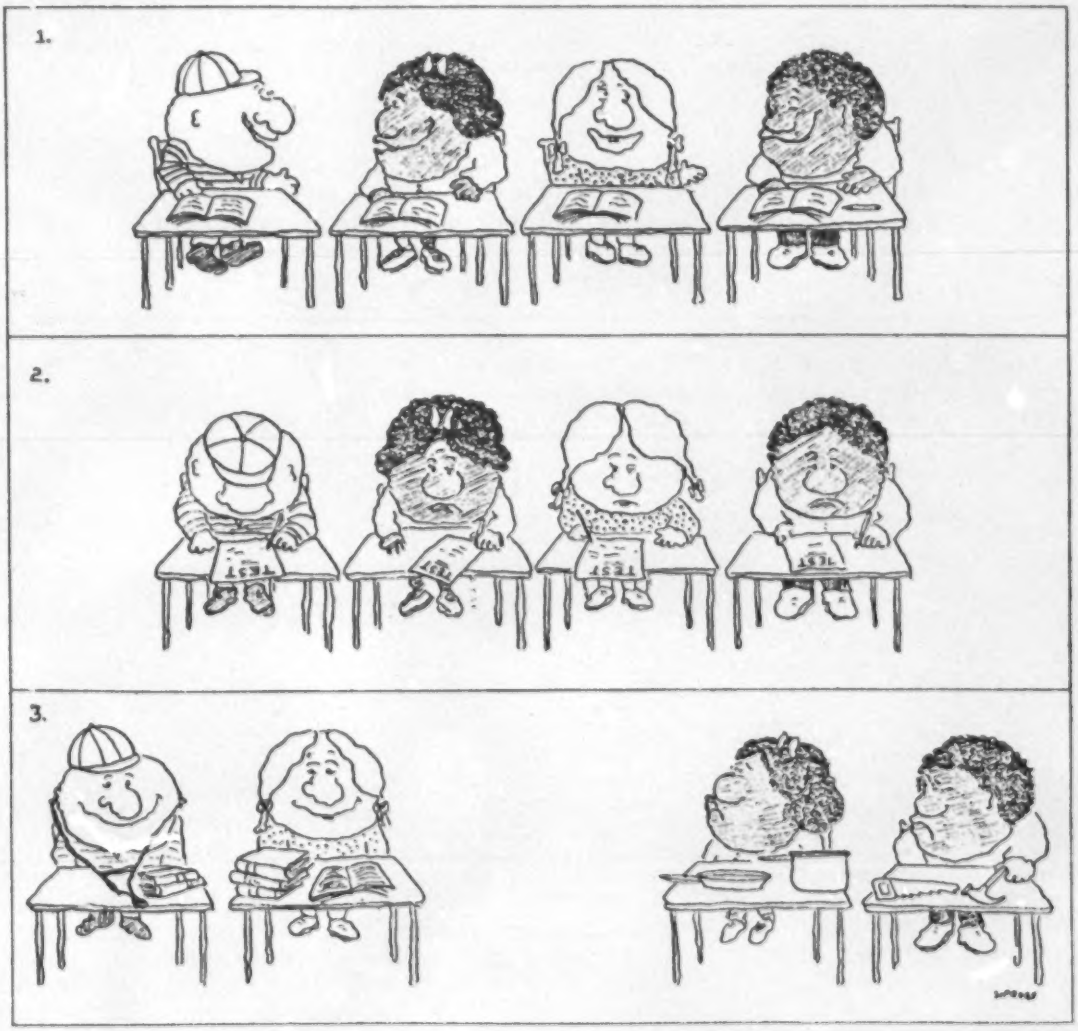
ELB

Morales v. Shannon, 516 F.2d 411 (C.A. 5, 1975)

Action involving several forms of alleged discrimination against Mexican-Americans in Uvalde, Texas system. Rulings: (1) The district court's finding of no segregative intent in the assignment of elementary pupils is clearly erroneous. The court refers to the fact that "as early as 1907, there was a 'Mexican School' in the system," a pattern of segregatory construction, and adoption of a selective neighborhood school policy (the "neighborhood assignment system froze the Mexican-American students into the Robb and Anthen Schools," but students in rural areas were given free choice and white students made segregatory choices). (p. 413) (2) Under the system's ability grouping program, there is disproportionate placement of Mexican-American students in lower groups (e.g., in grade seven, 10 of 144 white and 86 of 235 Mexican-American students are in the low group). "[T]he statistical results...are not so abnormal...as to justify an inference of discrimination. The record shows no more than the use of a non-discriminatory teaching practice or technique, a matter which is reserved to educators...." (p. 414) (3) The asserted need for bilingual-

bicultural education "again may involve a teaching technique." Reciting the system's progress in establishing programs, the court remands to the district court "for further consideration there on a fresh record...." The court notes that "[i]t is now an unlawful educational practice to fail to take appropriate action to overcome language barriers. See §204(f) of the Equal Educational Opportunity Act of 1974 [20 U.S.C. §1703(f)]...." (pp. 414-15)

ELB



Lora v. Board of Education of the City of New York, C.A. No.____, E.D.N.Y., Complaint (Clearinghouse #15768A)

Class action challenging New York's system of "special day schools" for the "socially maladjusted and emotionally disturbed." The 18 schools in the program educate 2700 students, 92% of whom are members of minority groups (only 59.8% of total enrollment is minority). Under system policy, students transferred to the "special...schools" are to have a higher intelligence than the maximum for students classified as mentally retarded, and histories of repeated and serious disruptive behavior, truancy, and failure to respond to intensive efforts by the home school to aid them. The complaint challenges, based upon the federal Constitution, many aspects of the special school program including the following: racial and sexual segregation; transfers without prior due process hearings and often based on consent which is "coerced" or resulting from misinformation; diluted educational programs; frequent illegal searches; and corporal punishment.

ELB

Note: Desegregation cases often involve the legality of ability grouping practices which have a segregative effect. See Hart v. Community School Board, 512 F.2d 37 (2 Cir., 1975); Hernandez v. Stockton Un. Sch. Dist., No. 101016 (Superior Ct. of San Joaquin County, 10/1/75) (Clearinghouse Review #7805); Boyd v. Pointe Coupee Parish Sch. Bd., 505 F.2d 633 (5 Cir. 1974); Morales v. Shannon, 516 F.2d 411 (5 Cir. 1975); Boykins v. Fairfield Bd. of Educ., 457 F.2d 1091, 1097 (5 Cir. 1972) (vocational courses); Copeland v. Sch. Bd. of Portsmouth, Va, 464 F.2d 932 (4 Cir. 1972) (special schools for students with learning problems).

See also Berkelman, Bray, and Vorchheimer cases summarized at II.A.A.3. supra.

The Supreme Court in Goss v. Lopez, 95 S.Ct. 729 (1975), held that some kind of procedural protection must, absent extraordinary circumstances, precede a suspension irrespective of its length. The Court's rationale was based in large part on the need to minimize the risk of error in decision making that may have serious consequences for the student. In a dissenting opinion joined by Chief Justice Burger and Justices Blackmun and Rehnquist, Justice Powell expressed a fear that the ruling "appears to sweep within the protected interest in education" numerous decisions in the educational process including "whether [the student] should be placed in a 'general', 'vocational', or 'college-preparatory' track." 95 S.Ct. at 747-48.

For general discussion of tracking, see D. Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Student Classification," 121 U.Pa.L. Rev. 705 (1973); M. McClung, "School Classification: Some Legal Approaches to Labels," 14 Inequality in Education 17 (July 1973); M. Sorgen, "Testing and Tracking in Public Schools," 24 Hastings L. J. 1129 (April 1973).

See Washington v. Davis, 44 L.W. 4789 (June 8, 1976), summarized at III.B.2 supra, for recent Supreme Court decision on testing.

VI. Federal Law

VI. Federal Law

Introduction

Many of the problem areas addressed in these materials, such as exclusion, misclassification, inadequate programs and other kinds of discrimination based on race, sex and handicap, are now being addressed to some extent in federal statutes and regulations. This new part on federal law includes sections on (A) The Rehabilitation Act of 1973, (B) The Education Amendments of 1974, (C) The H.E.W. Memorandum on Discrimination in Special Education Programs, (D) The Education for All Handicapped Children Act of 1975, and (E) Other Federal Statutes. Federal law dealing with sex discrimination and student records are set forth above at II.A.A. and III.D.5 & 6 respectively.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap, using language almost identical to section 601 of Title VI of the Civil Rights Act of 1964 prohibiting racial discrimination and section 901 of Title IX of the Education Amendments of 1972 prohibiting sex discrimination. Part VI.A. infra includes interpretation and application of the Rehabilitation Act by federal courts in two cases. H.E.W. will provide further clarification of the Act's non-discrimination clause in forthcoming regulations.

Federal financial assistance under "The Education of the Handicapped Amendments of 1974," 20 U.S.C. Sec. 1413, VI.B. infra, is conditioned upon each State submitting a plan meeting specific requirements designed to assure an appropriate education for all

handicapped children. These requirements include a full services goal, due process hearings, non-discriminatory testing and evaluation, and "mainstreaming" provisions. Parents and other persons interested in enforcing this Act and their state's plan can find useful information in a document titled "How to Look at Your State's Plan for Educating Handicapped Children," available from The Children's Defense Fund, 1520 New Hampshire Avenue, N.W., Washington D.C. 20036.

The H.E.W. Memorandum on Discrimination in Special Education Programs, VI.C. infra, specifies practices which may constitute a violation of Title VI or Title IX (mentioned above) where there is an adverse impact on children of one or more racial or national origin groups or on children of one sex. The standards set forth in paragraph 2 a-e of the Memorandum are almost a word-for-word recitation of 20 U.S.C. 1413(a)(13), and as such apply to all handicapped school children regardless of whether they are subject to racial or sexual discrimination. The Memorandum notes: "Some of the practices which may constitute a violation of Title VI or Title IX may also violate Section 504 of the Rehabilitation Act of 1973 [codified as 29 U.S.C. sec. 794] . . . which prohibits discrimination on the basis of handicap; and other practices not addressed by this memorandum and not currently prohibited by Title VI or Title IX may be prohibited by that Section." The Office of Civil Rights states in conclusion that "School districts have a continuing responsibility to abide by this memorandum. . . ."

The Education of All Handicapped Children Act of 1975, VI.D. infra, which passed Congress with only fourteen dissenting votes, could become one of the most extensive federal educational programs since it authorizes funding to begin at $387 million in the 1977-78 school year and to rise to $3.1 billion by 1982. The Act provides further legal rights for handicapped school children such as the right to an individualized educational plan developed

in consultation with the parents. It places special emphasis on each state finding handicapped children not now being served by the schools and giving them preference, along with the most severely handicapped, in the expenditure of federal funds. President Ford reluctantly signed the Act on December 2, 1975, but stated that he will try to amend it later because the Act (1) "falsely rais[es] the expectations of the groups affected by claiming authorization levels which are excessive and unrealistic," and (2) contains complex administrative requirements channeling tax dollars into administrative paperwork rather than educational programs.

The federal law summarized above provides welcome assistance to those interested in minimizing discriminatory classification of school children. It also poses some new problems since federal statutes and regulations, like other laws, are not self-implementing. Lawyers sometimes have to sue federal agencies to secure regulations necessary to implement the new federal rights, as noted at VI.A. infra and exemplified by American Council for the Blind v. Mathews at III.D.6 supra. Also, even when regulations have been promulgated, lawyers may sometimes find federal administrative enforcement too slow to protect their clients' interests, and thus may prefer to seek enforcement directly through the federal courts. See note at VI.A. infra.

VI.A. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 (Public Law 93-112) includes the following non-discrimination clause:

> No otherwise qualified handicapped individual in the United States as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> 29 U.S.C. sec. 794

As virtually all public school programs in the United States receive Federal financial assistance, they are precluded under this Act from discriminating against handicapped persons. See RISAC, VI.A.2 infra. Cf. Bd. of Pub. Instruction of Taylor County v. Finch, 414 F.2d 1068 (5 Cir. 1969).

When the Rehabilitation Act was being considered by the United States House of Representatives, Representative Vanik (D. Ohio) made clear that the Act's non-discrimination clause was intended to have the same purpose as would have been served by incorporating handicapped persons in the Civil Rights Act of 1964. See Congressional Record, vol.119, March 8, 1973, H 1531. Unlike section 601 of Title VI of the Civil Rights Act of 1964 (and section 901 of Title IX of the Education Amendments of 1972 prohibiting sex discrimination), however, the Secretary of H.E.W. has noted the greater complexity of enforcing non-discrimination on the basis of handicap. "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." 41 Federal Register 20296, May 17, 1976.

After suit was filed in federal court against H.E.W. for failure to promulgate regulations for enforcement of the Re-

habilitation Act's non-discrimination clause (see Education Daily, p.3, April 19, 1976), H.E.W. issued a "Notice of Proposed Rule-Making" for non-discrimination on the basis of handicap. See 41 Federal Register 20296, May 17, 1976. Even when final regulations are promulgated, however, H.E.W. often moves very slowly in investigating complaints and making determinations to withhold federal funds, and lawyers may find it more advantageous to seek enforcement directly through the federal courts.

Precedent under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, should enable handicapped individuals subjected to discrimination by public schools and other recipients of federal assistance to enforce non-discrimination under the Rehabilitation Act in federal courts. Cf. Lau v. Nichols, 94 S.Ct. 786 (1974); Lemon v. Bossier Parish School Board, 240 F. Supp. 709 (D.C.La. 1965), aff'd 370 F.2d 847 (5 Cir. 1967), cert. denied 388 U.S. 911 (1967).

Handicapped persons have already taken their claims under the Rehabilitation Act directly to the federal courts, as illustrated by the NCARC, RISAC and Hairston cases discussed below. Amending complaints in pending actions, as in the NCARC case at VI.A.1 infra, should substantially reduce the risk of abstention by federal courts in such cases.

The RISAC opinion at VI.A.2 infra emphasizes the broad definition of "handicapped individual" set forth in the last sentence of section 706(6). The RISAC court also holds that "the statute should be applied to correct discriminatory practices in any federally assisted program regardless of whether it is a vocational rehabilitation program or not."

The importance of the Rehabilitation Act for handicapped school children is illustrated by Judge Hall's first conclusion of law in Hairston v. Drosick: "The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is in violation of Title V of Public Law 93-112, 'The Rehabilitation Act of 1973,' 29 U.S.C. sec. 794. The federal statute proscribes discrimination against handicapped individuals in any program receiving federal financial assistance. To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute. School officials must make every effort to include such children within the regular public classroom situation, even at great expense." The Hairston case is summarized at VI.A.3 infra.

The Rehabilitation Act is described as: "An Act to replace the Vocational Rehabilitation Act, to extend and revise the authorization of grants to States for vocational rehabilitation services, with special emphasis on services to those with the most severe handicaps, to expand special Federal responsibilities and research and training programs with respect to handicapped individuals, to establish special responsibilities in the Secretary of Health, Education, and Welfare for coordination of all programs with respect to handicapped individuals within the Department of Health, Education and Welfare, and for other purposes." For complete provisions of this Act, see 29 U.S.C. sec. 701 et seq. For legislative history and purpose of Act, see 1973 U.S. Code Cong. and Adm. News, 93rd Congress, pp. 2076-2143.

VI.A.1. N.C.A.R.C. Motion to Amend Complaint

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

CIVIL ACTION NO. 3050

NORTH CAROLINA ASSOCIATION FOR RETARDED CHILDREN, et al, Plaintiffs vs. STATE OF NORTH CAROLINA, et al, Defendants UNITED STATES OF AMERICA Amicus Curiae	MOTION TO AMEND AMENDED COMPLAINT

The plaintiffs do hereby move the Court for an Order allowing them to amend the Amended Complaint in this action as follows:

1. By deleting paragraph 1 of the section of the Amended Complaint designated as Complaint Jurisdiction and inserting in lieu thereof the following:

The jurisdiction of the Court is invoked under Title 28 U.S.C. § 1343, 42 U.S.C. § 1983 and Title 28 U.S.C. §§ 2201-2202 and P.L. 93-112 of the 93rd Congress H.R. 8070 effective September 26, 1973 cited as the "Rehabilitation Act of 1973", including Section 504 of said Act, this being an action for declaratory judgment and permanent injunctive relief to redress the deprivation under color of state laws of rights, privileges and and immunities secured to plaintiffs by the Constitution and laws of the United States.

2. By adding Count XI as follows:

Count XI

63. That the defendants are discriminating against retarded children in violation of P.L. 93-112 of the 93rd Congress H.R. 8070 effective September 26, 1973 cited as the "Rehabilitation Act of 1973" by excluding and denying retarded children, including the plaintiffs, because of their handicaps, from participation under programs of activities receiving Federal financial assistance.

64. That the defendants are specifically in violation of Section 304 of the aforesaid "Rehabilitation Act of 1973" which prohibits discrimination against handicapped persons, including mentally retarded in any program or activity receiving Federal financial assistance.

3. By adding to paragraph 4 of the prayer as follows:

(h) from violation of P.L. 93-112 of the 93rd Congress H.R. 8070 cited as the "Rehabilitation Act of 1973", including Section 504 of said Act.

This the 13th day of February, 1974.

BLANCHARD, TUCKER, DENSON & CLINE

BY: _____

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Note: Section 504 of P.L. 93-112 has now been codified as 29 U.S.C. Sec. 794. For summary of NCARC complaint, see page 145 of Classification Materials, 1973 revised ed.

VI.A.2. *RISAC* Interpretation of Rehabilitation Act's Non-Discrimination Clause

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

RHODE ISLAND SOCIETY FOR AUTISTIC CHILDREN, et al	)	
v.	)	C.A. No. 5081
BOARD OF REGENTS FOR EDUCATION FOR THE STATE OF RHODE ISLAND, et al	)	

MEMORANDUM AND OPINION

* * * *

We turn now to defendants' once again belated contention, in view of their stipulation of December 1974, that 29 U.S.C. sec. 794 has no applicability to the instant case.

29 U.S.C. sec. 794 provides that:

> "No otherwise qualified handicapped individual in the United States as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The defendants contend that this statute does not apply to the education of handicapped children but only to vocational rehabilitation programs which enhance the handicapped individual's employability. I note that it is hard to perceive a bright-line distinction between these two concepts. This argument is pred-

icated upon the fact that the statute relies on sec. 706(6) for its definition of a handicapped person and that sec. 794 is codified in Chapter 16 entitled "Vocational and Rehabilitative Services" of Title 29 (Labor) of the United States Code.

Analysis of sec. 706(6) belies defendants' position. Defendants rely upon that portion of sec. 706(6) which provides:

> "The term 'handicapped individual' means may individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter."

However sec. 794 is not a part of either subchapters I or III but rather it is located in subchapter V to which sec. 706(6) provides a much broader definition. Thus, the appropriate definition of "handicapped individual" is found in the last sentence of sec. 706(6) which states:

> "For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such impairment."

This definition makes no mention of employability or vocational rehabilitation. Further, the clear language of the statute states that discrimination against handicapped persons is prohibited in "any program or activity receiving Federal financial assistance." Therefore, this Court concludes that the broad

definition of handicapped individual and the lack of any limiting language in sec. 794 indicates, contrary to defendants' analysis, that the statute should be applied to correct discriminatory practices in any federally assisted program regardless of whether it is a vocational rehabilitation program or not. This Court is guided in making this analysis "by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Cf. Sen. Rep. No. 93-318, 1973 U.S. Code Congressional and Administrative News, 93d Congress, 1st Session, 2076, 2123, 2143 (1974).

A review of plaintiffs' pretrial memorandum reveals at the least the enormous complexities of the factual issues involved and their assertion that federal monetary support of Rhode Island educational programs is very broad. These factors, when analyzed in conjunction with the broad language of the Supreme Court's decision in Lau v. Nichols, 414 U.S. 563 (1974), interpreting an analog to 29 U.S.C. sec. 794, lead the Court to conclude that virtually all the evidence which plaintiffs can be expected to present on any other issue, statutory or constitutional, is also evidence relating to plaintiffs' claim that sec. 794 has been violated. . . .]

Note: See IV.C. supra for summary of RISAC case.

VI.A.3. *Hairston v. Drosick*

Hairston v. Drosick, C.A. No. 75-0691CH, S.D.W.Va., Memorandum and Order, 1/14/76 (Clearinghouse No. 17,504)

Challenge based upon the Rehabilitation Act of 1973, 20 U.S.C. 794, and procedural due process safeguards to exclusion of mentally competent student with spina bifida (inability to control bowels and minor limp) from regular class in system receiving federal financial assistance. The system, unwilling to admit the student to regular class without her mother's intermittent presence which was not possible, offered homebound instruction, or placement in a class for physically handicapped students (not complying with state regulations in a number of respects). Many other spina bifida students in the state attend regular classes. Rulings: (1) "A major goal of the educational process is the socialization process that takes place in the regular classroom, with the resulting capability to interact in a social way with one's peers. It is therefore imperative that every child receive an education with his or her peers insofar as it is at all possible." (Mem. Op., p. 6) (2) "The exclusion of a minimally handicapped child from a regular public classroom situation without a bonafide educational reason is in violation of...[29 U.S.C. 794]." There must be a "compelling educational justification" to deny a handicapped student access to a regular class. Systems must make "every effort" to include these students in regular classes "even at great expense...." (p. 8) (3) The exclusion of the minor plaintiff from the regular class without notice and hearing denied procedural due process. Due process safeguards may be complied with by satisfying the West Virginia regulations adopted pursuant to 20 U.S.C. 1413(a)(13). These regulations provide for full notice, and an extensive hearing before an impartial person. (pp. 8-10) (4)The defendants shall readmit the student to class and any proposed exclusion shall be reviewed by the court before it is effective.

ELB

VI.B. Federal Assistance to States for Education of Handicapped Children

20 U.S.C. Sec. 1413 (part of Pub. L. 93-380, Education Amendments of 1974)

§ 1413. State plans—Submission to Commissioner; requirements

(a) Any State which desires to receive grants under this subchapter shall submit to the Commissioner through its State educational agency a State plan (not part of any other plan) in such detail as the Commissioner deems necessary. Such State plan shall—

(1) set forth such policies and procedures as will provide satisfactory assurance that funds paid to the State under this subchapter will be expended (A) either directly or through individual, or combinations of, local educational agencies, solely to initiate, expand, or improve programs and projects, including preschool programs and projects, (i) which are designed to meet the special educational and related needs of handicapped children throughout the State, and (ii) which are of sufficient size, scope, and quality (taking into consideration the special educational needs of such children) as to give reasonable promise of substantial progress toward meeting those needs, and (B) for the proper and efficient administration of the State plan (including State leadership activities and consultative services , and for planning on the State and local level: *Provided*, That the amount expended for such administration and planning shall not exceed 5 per centum of the amount allotted to the State for any fiscal year or $200,000 ($35,000 in the case of Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands), whichever is greater;

[See main volume for text of (2) to (9)]

(10) provide satisfactory assurance that effective procedures will be adopted for acquiring and disseminating to teachers of, and administrators of programs for, handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects;

(11) contain a statement of policies and procedures which will be designed to insure that all education programs for the handicapped in the State will be properly coordinated by the persons in charge of special education programs for handicapped children in the State educational agency;

(12) (A) establish a goal of providing full educational opportunities to all handicapped children, and (B) provide for a procedure to assure that funds expended under this subchapter are used to accomplish the goal set forth in (A) of this paragraph and priority in the utilization of funds under this subchapter will be given to handicapped children who are not receiving an education; and

(13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved

in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal; and (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and (C) procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.

Amendment of State plans; effective date

(b) (1) Any State which desires to receive a grant under this subchapter for any fiscal year beginning after June 30, 1975, shall submit to the Commissioner for approval not later than one year after August 21, 1974, through its State educational agency an amendment to the State plan required under subsection (a) of this section, setting forth in detail the policies and procedures which the State will undertake in order to assure that—

(A) all children residing in the State who are handicapped regardless of the severity of their handicap and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(B) policies and procedures will be established in accordance with detailed criteria prescribed by the Commissioner to protect the confidentiality of such data and information by the State;

(C) there is established (i) a goal of providing full educational opportunities to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal; and

(D) the amendment submitted by the State pursuant to this subsection shall be available to parents and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

For the purpose of this subchapter, any amendment to the State plan required by this subsection and approved by the Commissioner shall be considered, after June 30, 1975, as a required portion of the State plan.

(2) The requirement of paragraph (1) of this subsection shall not be effective with respect to any fiscal year in which the aggregate of the amounts allotted to the States for this subchapter for that fiscal year is less than $45,000,000.

* * * * *

[Omitted are sections (c),(d) and (e) providing for public comment on the State plan prior to approval by the U.S. Commissioner of Education, procedures for disapproval of the plan and termination of funding by the Commissioner, and procedures for judicial review of action taken by the Commissioner.]

Note: As of October 1, 1977, the provisions set forth above will be amended by the "Education for All Handicapped Children Act of 1975," P.L. 94-142, summarized at VI.D. infra. The new provisions are designed to retain, and in many cases strengthen, important advances made in the Education Amendments of 1974.

Assistance to States for Education of Handicapped Children, 40 Fed. Reg. 18998 (1975), 45 C.F.R. 121a.

The Commissioner of Education has submitted to Congress regulations and guidelines governing federal assistance to states for the education of handicapped children udner Part B of the Education of the Handicapped Act (Title VI of Pub.L. 91-230; 20 U.S.C. 1411-1414).

Note: A pamphlet titled "How to Look at Your State's Plans for Educating Handicapped Children," (1975 pp.22) which describes the Education of the Handicapped Act, state and local responsibilities under this law, and how parents can get involved in protecting the rights of their children under this law is available from the Children's Defense Fund, Washington Research Project Inc., 1520 New Hampshire Ave., N.W., Washington, D.C. 20006.

VI.C. HEW Memorandum on Discrimination in Special Education Programs

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

AUGUST 1975

MEMORANDUM FOR CHIEF STATE SCHOOL OFFICERS
AND LOCAL SCHOOL DISTRICT SUPERINTENDENTS

SUBJECT: Identification of Discrimination in the Assignment of Children to Special Education Programs

Title VI of the Civil Rights Act 1964 and the Departmental Regulation (45 CFR Part 80) promulgated thereunder require that there be no discrimination on the basis of race, color, or national origin in the operation of any programs benefiting from Federal financial assistance. Similarly, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities benefiting from Federal financial assistance.

Compliance reviews conducted by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity on the basis of race, color, national origin, or sex in the assignment of children to special education programs.

As used herein, the term "special education programs" refers to any class or instructional program operated by a State or local education agency to meet the needs of children with any mental, physical, or emotional exceptionality including, but not limited to, children who are mentally retarded, gifted and talented, emotionally disturbed or socially maladjusted, hard of hearing, deaf, speech-impaired, visually handicapped, orthopedically handicapped, or to children with other health impairments or specific learning disabilities.

The disproportionate over- or underinclusion of children of any race, color, national origin, or sex in any special program category may indicate possible noncompliance with Title VI or Title IX. In addition, evidence of the utilization of criteria or methods of referral, placement or treatment of students in any special education program which have the effect of subjecting individuals to discrimination because of race, color, national origin, or sex may also constitute noncompliance with Title VI and Title IX.

In developing its standards for Title VI and Title IX compliance in the area of special education, the Office for Civil Rights has carefully reviewed

many of the requirements for State plans contained in Section 613 of the Education Amendments of 1974 (P.L. 93-380), which amended Part B of the Education of the Handicapped Act.

Based on the above, any one or more of the following practices may constitute a violation of Title VI or Title IX where there is an adverse impact on children of one or more racial or national origin groups or on children of one sex:

1. Failure to establish and implement uniform nondiscriminatory criteria for the referral of students for possible placement in special education programs.

2. Failure to adopt and implement uniform procedures for insuring that children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement including, but not limited to the following:

   a. prior written and oral notice to parents or guardians in their primary language whenever the local or State education agency proposes to change the educational placement of the child, including a full explanation of the nature and implications of such proposed change;

   b. an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification of the child, and obtain an independent educational evaluation of the child;

   c. procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State, including the assignment of an individual, who is not an employee of the State or local educational agency involved in the education of children, to act as a surrogate for the parents or guardians;

   d. provisions to insure that the decisions rendered in the impartial due process hearing referred to in part (b) above shall be binding on all parties, subject only to appropriate administrative or judicial appeal; and

e. procedures to insure that, to the maximum extent appropriate, exceptional children are educated with children who are not exceptional and that special classes, separate schooling, or other removal of exceptional children from the regular education environment occur only when the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

3. Failure to adopt and implement procedures to insure that test materials and other assessment devices used to identify, classify and place exceptional children are selected and administered in a manner which is non-discriminatory in its impact on children of any race, color, national origin or sex.

   Such testing and evaluation materials and procedures must be equally appropriate for children of all racial and ethnic groups being considered for placement in special education classes. In that regard procedures and tests must be used which measure and evaluate equally well all significant factors related to the learning process, including but not limited to consideration of sensorimotor, physical, socio-cultural and intellectual development, as well as adaptive behavior. Adaptive behavior is the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of her or his age and cultural group. Accordingly, where present testing and evaluation materials and procedures have an adverse impact on members of a particular race, national origin, or sex, additional or substitute materials and procedures which do not have such an adverse impact must be employed before placing such children in a special education program.

4. Failure to assess individually each student's needs and assign her or him to a program designed to meet those individually identified needs.

5. Failure to adopt and implement uniform procedures with respect to the comprehensive reevaluation at least once a year of students participating in special education programs.

6. Failure to take steps to assure that special education programs will be equally effective for children of all cultural and linguistic backgrounds.

School officials should examine current practices in their districts to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately devise and implement a plan of remediation. Such a plan must not only include the redesign of a program or programs to conform to the above outlined practices, but also the provision of necessary reassessment or procedural opportunities for those students currently assigned to special education programs in a way contrary to the practices outlined. All students who have been inappropriately placed in a special education program in violation of Title VI or Title IX requirements must be reassigned to an appropriate program and provided with whatever assistance may be necessary to foster their performance in that program, including assistance to compensate for the detrimental effects of improper placement.

Some of the practices which may constitute a violation of Title VI or Title IX may also violate Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112), as amended by the Rehabilitation Act of 1973 (P.L. 93-516) which prohibits discrimination on the basis of handicap; and other practices not addressed by this memorandum and not currently prohibited by Title VI or Title IX may be prohibited by that Section. The Office for Civil Rights is currently formulating the regulation to implement Section 504.

School districts have a continuing responsibility to abide by this memorandum in order to remain in compliance with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

Martin Gerry
Acting Director
Office for Civil Rights

VI.D. The Education for All Handicapped Children Act Public Law 94-142

On November 28, the President signed into law S.6, the "Education For All Handicapped Children Act." The President's approval followed overwhelming endorsement of the House-Senate conference agreement in the Congress, with the House giving its approval to the conference report on November 18 by a vote of 404 to 7. On the following day the Senate gave its approval by a margin of 87 to 7. What follows is a characterization of the major features of what is now P. L. 94-142.

FORMULA

P. L. 94-142 establishes a formula in which the Federal government makes a commitment to pay a gradually-escalating percentage of the National average expenditure per public school child times the number of handicapped children being served in the school districts of each State in the Nation. That percentage will escalate on a yearly basis until 1982 when it will become a permanent 40 percent for that year and all subsequent years.

Formula Scale

Fiscal 1978 ..... five percent
Fiscal 1979 ..... ten percent
Fiscal 1980 ..... twenty percent
Fiscal 1981 ..... thirty percent
Fiscal 1982 ..... forty percent

It should be carefully noted that such a formula carries an inflation factor, i.e. the actual money figure fluctuates with inflationary-deflationary adjustments in the National average per pupil expenditure.

FORMULA "KICK-IN"

As obviously indicated in the preceding heading, the new formula will not go into operation until fiscal 1978.

It will be recalled that previously existing law was already moving toward a permanent, significant increase in the Federal commitment. Public Law 93-380, the Education Amendments of 1974 (signed August 21 of 1974), created the first entitlement for handicapped children, based upon factors of the number of all children aged three to twenty-one within each State times $8.75. This formula (called the "Mathias formula" after its originator), amounting to a total annual authorization of $680 million, was authorized for fiscal 1975 only -- with a view toward permitting an emergency infusion of money into the States while at the same time deferring to final determination of a permanent new funding formula as now contained in Public Law 94-142. This "Mathias formula" would be retained in both bills until "kick-in" of the new formula.

CEILINGS

For the two years of fiscal 1976 and 1977 when the formula remains under the "Mathias entitlement," the conferees set authorization ceilings of $100 million for fiscal 1976 and $200 million for fiscal 1977. On the basis of the current National average per pupil

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expenditure, the following authorization ceilings are generated for the first years of the new formula:

Fiscal 1978 ..... $387 million (on the five-percent factor)
Fiscal 1979 ..... $775 million (on the ten-percent factor)
Fiscal 1980 ..... $1.2 billion (on the twenty-percent factor)
Fiscal 1981 ..... $2.32 billion (on the thirty-percent factor)
Fiscal 1982 ..... $3.16 billion (on the forty-percent factor)

COUNTING LIMITATION

P. L. 94-142 addresses the potential threat of "over-counting" children as handicapped in order to generate the largest possible Federal allocation. The measure prohibits counting more than 12 percent as handicapped served within the total school-age population of the State between the ages of five and seventeen.

LEARNING DISABILITIES

P. L. 94-142 retains, with minor alterations, the existing Federal definition of handicapped children (EHA, Section 602 (I) and (15) of extant law), and this definition includes children with specific learning disabilities. However, it would appear at this point of interpretation of conference action that the Commissioner may, within one year, provide detailed regulations relative to SLD, including the development of a more precise definition, the prescription of comprehensive diagnostic criteria and procedures, and the prescription of procedures for monitoring of said regulations by the Commissioner. If the authorizing committees of the House and Senate disapprove the Commissioner's regulations, then a ceiling on the number of children with learning disabilities who may be counted by the State for purposes of the formula will be included when the new formula takes effect. The ceiling would provide that not more than one-sixth of the 12 percent of school-age children aged five to seventeen who may be counted as handicapped children served may be children with specific learning disabilities.

PRIORITIES

Previously existing law (P. L. 93-380), in conformance with the overall goal of ending exclusion, orders a priority in the use of Federal funds for children "still unserved." P. L. 94-142 maintains and broadens that priority in the following manner:

* First priority to children "unserved".
* Second priority to children inadequately served when they are severely handicapped (within each disability).

This priority must be adhered to by both the State education agency and its local education agencies.

BENEFICIARIES

P. L. 94-142 stipulates that all handicapped children, aged three to twenty-one years, may enjoy the special education and related services provided through this measure. There is also provision for the use of Federal monies for programs of early identification and screening.

PASS-THROUGH

As finalized, P. L. 94-142 contains a substantial pass-through to the local school districts. In the first year of the new formula, 50 percent of the monies going to each State would be allocated to the State education agency, and 50 percent would be allocated to the local education agencies. In the following year, fiscal 1979, the LEA entitlement would be enlarged to 75 percent of the total allocation to a given State, with the SEA retaining 25 percent. This 75-25 arrangement commencing in fiscal '79 becomes the permanent distribution arrangement. The current State-control of all funds is retained for the remainder of fiscal 1976 and fiscal 1977.

CONSTRAINTS UPON LOCALITIES

Though P. L. 94-142 authorizes a substantial local entitlement, there are numerous "strings attached." Initially, the State education agency will act as the clearinghouse of all data from the localities gathered in order to determine local entitlement, and the State will transmit that information to the Commissioner. Furthermore, the State education agency may refuse to pass-through Federal monies generated when:

* the school district does not conform to the overall State-plan requirements contained in this Act and in existing law (such as "full service" goal, confidentiality, etc.);

* the school district fails to meet the local application requirements;

* the State deems the local district unable to make effective use of its entitlement unless it consolidates its entitlement with the entitlement of one or more other school districts (this apparently allows great flexibility in funding arrangements -- intermediate districts, special districts, etc.);

* when the program for handicapped children within the school district is of insufficient size and scope;

* when the school district is maintaining "full service" for all its handicapped children with State and local funds. (This provision will end when all districts within the State have reached "full service," at which time a degree of supplanting will in effect be permitted.)

Most significantly, P. L. 94-142 sets a flat monetary minimum. If a school district, after counting all of its handicapped children served, cannot generate an allocation for itself of at least $7,500, a pass-through to that school district does not occur. This provision is, of course, also aimed at encouraging various sorts of special education consortia in order to make a meaningful use of the Federal dollars.

If an SEA withholds a local entitlement under any of the aforementioned circumstances, it must nonetheless assure that the monies generated by said entitlement are used to assure the public education of the handicapped children residing in the district in question.

STATE AND LOCAL REQUIREMENTS

P. L. 94-142 makes a number of critical stipulations which must be adhered to by both the State and its localities. These stipulations include:

* assurance of extensive child identification procedures;
* assurance of "full service" goal and detailed timetable;
* a guarantee of complete due process procedures;
* the assurance of regular parent or guardian consultation;
* maintenance of programs and procedures for comprehensive personnel development including in-service training;
* assurance of special education being provided to all handicapped children in the "least restrictive" environment;
* assurance of nondiscriminatory testing and evaluation;
* a guarantee of policies and procedures to protect the confidentiality of data and information;
* assurance of the maintenance of an individualized program for all handicapped children;
* assurance of an effective policy guaranteeing the right of all handicapped children to a free, appropriate public education, at no cost to parents or guardian;
* assurance of a surrogate to act for any child when parents or guardians are either unknown or unavailable, or when said child is a legal ward of the state.

It is most important to observe that an official, written document containing all of these assurances is now required (in the form of an application) of every school district receiving its Federal entitlement under P. L. 94-142.

HOLD HARMLESS

P. L. 94-142 stipulates that every State will be "held harmless" at its actual allocation for fiscal 1977 (the last year of appropriations under the "Mathias formula").

EXCESS COST

P. L. 94-142 provides that Federal monies must be spent only for those "excess cost" factors attendant to the higher costs of educating handicapped children. A given school district must determine its average annual per pupil expenditure for all children being served, and then apply the Federal dollars only to those additional cost factors for handicapped children beyond the average annual per pupil expenditure. Such a requirement does not obtain for the State education agency in the utilization of its allocation under this Act. However, the State education agency is required to match its allocation on a "program basis," but is not required to match with new monies.

INDIVIDUALIZED INSTRUCTION

P. L. 94-142 requires the development of an individualized written education program for each and every handicapped child served within a given state to be designed initially in consultation with parents or guardian, and to be reviewed and revised as necessary, but

at least annually. This provision takes effect in the first year under the new formula, fiscal 1978. At least the following premises governed inclusion of this requirement:

* Each child requires an educational blueprint custom-tailored to achieve his/her maximum potential.

* All principles in the child's educational environment, including the child, should have the opportunity for input in the development of an individualized program of instruction.

* Individualization means specifics and timetables for those specifics, and the need for periodic review of those specifics -- all of which produces greatly enhanced fiscal and educational accountability.

DATE CERTAIN

It is generally agreed that the Congress ought to fix a chronological date, however innately arbitrary, beyond which no State or locality may be failing without penalty to guarantee against outright exclusion from the public educational systems. Also, it is felt that the States ought to be given a reasonable, but not lengthy, time period in which to reach "full service."

P.L. 94-142 therefore requires that every State and its localities, if they are to continue to receive funds under this Act, must be affording a free public education for all handicapped children aged three to eighteen by the beginning of the school year (September 1) in 1978, and further orders the availability of such education to all children aged three to twenty-one by September 1, 1980. However, these mandates carry a big "if" in the area of preschool, apparently in the age range of three to five. Under P.L. 94-142 such mandate for children in that group would apply only when such a requirement is not "inconsistent" with State law or practice, or any court decree.

These date-certain assurances must be met as a matter of State eligibility for funding under the Act, (Section 612).

DUE PROCESS

The vital provisions of previously existing law (P.L. 93-380, the Stafford guarantees") toward the guarantee of due process rights with respect to the identification, evaluation, and educational placement of all handicapped children within each State are constructively refined in P.L. 94-142 toward at least the following objectives:

* to strengthen the rights of all involved;

* to conform more precisely to court decrees;

* to clarify certain aspects of existing law;

* to guarantee the rights of all parties relative to potential court review;

* to ensure maximum flexibility in order to conform to the varying due process procedures among the States.

It should be observed that these refinements take effect in the first year under the new formula, i.e. fiscal 1978. In the meantime, those basic features of due process as authorized in the prior Act (P. L. 93-380) must be maintained by the States.

It should be further noted that, when the parents or guardian of a child are not known, are unavailable, or when the child is a legal ward of the State, the State education agency, local education agency or intermediate education agency (as appropriate) must assign an individual to act as a surrogate for the child in all due process proceedings. Moreover, such assigned individual may not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the particular child.

FEDERAL SANCTION

If the Commissioner finds substantial noncompliance with the various provisions of this Act, with emphasis upon the guarantees for children and their parents, he shall terminate the funding to a given locality or State under this Act, as well as the funding of those programs specifically designed for handicapped children under the following titles:

* Part A of Title I of the Elementary and Secondary Education Act
* Title III of the Elementary and Secondary Education Act (innovative programs) and its successor, Part C. Educational Innovation and Support, Section 431 of P. L. 93-380
* The Vocational Education Act

SEA AUTHORITY

P. L. 94-142 requires that the State educational agency be responsible for ensuring that all requirements of the Act are carried out, and that all education programs within the State for all handicapped children, including all such programs administered by any other State or local agency, must meet State educational agency standards and be under the general supervision of persons responsible for the education of handicapped children. This provision establishes a single line of authority within one State agency for the education of all handicapped children within each State.

This provision is included in the Act for at least the following reasons:

* to centralize accountability, both for the State itself and from the standpoint of the Federal government as a participant in the educational mission;
* to encourage the best utilization of education resources;
* to guarantee complete and thoughtful implementation of the comprehensive State plan for the education of all handicapped children within the State as already required in P. L. 93-380, the Education Amendments of 1974, as well as the implementation of the further planning provisions of this Act;
* to ensure day-by-day coordination of efforts among involved agencies;

* to terminate the all too frequent practice of the bureaucratic "bumping" of children from agency to agency with the net result of no one taking substantive charge of the child's educational wellbeing;

* to squarely direct public responsibility where the child is totally excluded from an educational opportunity;

* to guarantee that the State agency which typically houses the greatest educational expertise has the responsibility for at least supervising the educational mission of all handicapped children;

* to ensure a responsible public agency to which parents and guardians may turn when their children are not receiving the educational services to which they are entitled.

SPECIAL EVALUATIONS

P. L. 94-142 orders a statistically valid survey of the effectiveness of individualized instruction as mandated in the legislation. P. L. 94-142 also orders the U.S. Commissioner to conduct an evaluation of the effectiveness of educating handicapped children in the least restrictive environment and orders the Commissioner to evaluate the effectiveness of procedures to prevent erroneous classification of children.

SUPPLANTING

P. L. 94-142 carries a stipulation which permits the U.S. Commissioner to waive the provision against supplanting of State and local funds with Federal dollars when a State presents clear and convincing evidence that all handicapped children within said State do in fact have available to them a free, appropriate public education.

EMPLOYMENT

P. L. 94-142 stipulates that recipients of Federal assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals.

ARCHITECTUAL BARRIERS

P. L. 94-142 authorizes such sums as may be necessary for the U.S. Commissioner to award grants to pay all or part of the cost of altering existing buildings and equipment to eliminate architectural barriers in educational facilities. Such provision is aimed at assuring certain handicapped children an appropriate public education in the least restrictive environment.

PRESCHOOL INCENTIVE

P. L. 94-142 carries a special incentive grant aimed at encouraging the States to provide special education and related services to its preschool handicapped children. Each handicapped child in the State aged three to five who is counted as served will generate a special $300 entitlement. It should be noted that this incentive entitlement goes to the State education agency and must be used by the SEA to provide preschool services. Additionally, this entitlement is a separate "line item" appropriation, independent of the larger P. L. 94-142 entitlement.

ADVISORY

P. L. 94-142 orders that each State shall have an advisory panel to be appointed by the Governor or any other official authorized under State law to make such appointments. This panel must be composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children.

The panel shall have the following duties:

* advise the State education agency on unmet needs relative to the education of all handicapped children within the State;

* comment publicly on rules and regulations issued by the State and procedures proposed by the State for distribution of funds;

* assist the State in developing and reporting such data and evaluations as may assist the U.S. Commissioner.

NATIVE AMERICANS

Not more than one percent of the funds available under P. L. 94-142 are targeted for supporting the special education of American Indian children on the reservations serviced by elementary and secondary schools. However, the Commissioner of Education may make such a payment to the Secretary of the Interior (Bureau of Indian Affairs is within Interior) only after receiving an application from the Secretary of the Interior which meets all of those requirements contained in this summary under the heading STATE AND LOCAL REQUIREMENTS. Thus, for instance, the Secretary of the Interior must assure all of those educational rights for Native American children required of the States and their localities.

PRIVATE SETTINGS

Children in private elementary and secondary schools may receive assistance for their special education under this Act if:

* such children are placed in or referred to such schools by the State or local education agency as a means of carrying out public policy;

* an individualized education program, as required by this Act, is maintained for such children in private facilities;

* the special education is at no cost to the parents;

* the State education agency determines that participating schools meet the standards that apply to State and local education agencies;

* the children served in such facilities are accorded all of the educational rights they would have if served directly by public agencies.

STATE ADMINISTRATION

The State education agency is permitted to reserve to itself from the total allotment to the State under this Act - in any given year - five percent or $200,000, whichever is greater, to support its administrative responsibilities.

DATA

The U.S. Commissioner of Education, through the National Center for Educational Statistics, is required to provide to the Congress and the public at least annually - and is required to update annually - vital data on the educational status of the Nation's handicapped children, such as:

* children served and unserved within each disability;
* children within the regular education environment, and children who are not;
* the number of educational personnel employed, by disability category;
* number of children receiving special education instruction within residential settings, and the number of children residing in institutions having a deinstitutionalized education program.

LEGISLATIVE FORMAT

P.L. 94-142 amends the existing Education of the Handicapped Act and rewrites Part B of that Act. In that context, it is important to observe that all of the important advances made in Part B through P.L. 93-380 (Education Amendments of 1974) are retained in P.L. 94-142, and in many instances, are considerably improved upon.

IMPACT

P.L. 94-142 provides for an annual evaluation of the effectiveness of this legislation toward assistance in the achievement of a free, appropriate public education for all of the Nation's handicapped children.

LIFETIME

P.L. 94-142 establishes a permanent authorization with no expiration date.

Note: Many provisions of this Act are not effective until October 1, 1977. See Section 8 of Act for effective dates. P.L. 94-142 can be found at 89 Stat. 773, Congressional Record, Vol. 121, No. 170 (November 14, 1975), and ___ U.S.C. ___. For legislative history, see 1975 U.S. Code Cong. & Adm. News, 94th Congress, pp. 1425-1503.

VI.E. Other Federal Statutes

TITLE I, ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (P.L. 89-10)

In recognition of the special educational needs of children of low income families and the impact that concentrations of low income families have on the ability of local educational agencies to support educational programs, the Title provides financial assistance to local educational agencies for the education of children of low income families. The improvement of educational programs in low income areas by various means, including preschool programs, is declared as policy. (*Sec. 101*)

Grants to expand and improve educational programs for children in institutions for the delinquent or neglected are made to state agencies and local educational agencies operating or supporting such institutions. Eligible institutions submit proposals in cooperation with state and local agencies such as health, welfare, education, or corrections agencies to the state educational agencies. The allocations for this program are formula based. (*Sec. 103*)

P.L. 89-313 amended this Title to provide grants to state agencies directly responsible for providing free public education for handicapped children. Students in state operated and supported institutions for the handicapped qualify for aid under the provisions set forth in this Title.

"In the case of a State agency which is directly responsible for providing free public education for handicapped children (including mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education), the maximum basic grant which that agency shall be eligible to receive under this part for any fiscal year shall be an amount equal to the Federal percentage of the average per pupil expenditure in that State or, if greater, in the United States multiplied by the number of such children in average daily attendance, as determined by the Commissioner, at schools for handicapped children operated or supported by that State agency, in the most recent fiscal year for which satisfactory data are available. Such State agency shall use payments under this part only for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special educational needs of such children." (*Sec. 103*)

Payment to the states for handicapped children in state supported schools and institutions shall be the maximum grant as determined by the formula regardless of sums appropriated. (*Sec. 108*)

P.L. 93-380, the Education Amendments of 1974, further amends this Title in the following way (*Section 121*):

"(c) A State agency shall use the payments made under this section only for programs and projects (including the acquisition of equipment and, when necessary, the construction of school facilities) which are designed to meet the special educational needs of such children, and the State agency shall provide assurances to the Commissioner that each such child in average daily attendance counted under subsection (b) will be provided with such a program, commensurate with his special needs, during any fiscal year for which such payments are made.

"(d) In the case where such a child leaves an educational program for handicapped children operated or supported by the state agency in order to participate in such a program operated or supported by a local educational agency, such child shall be counted under subsection (b) if (1): he continues to receive an appropriately designed educational program; and (2) the State agency transfers to the local educational agency in whose program such child participates an amount equal to the sums received by such State agency under this section which are attributable to such child, to be used for the purposes set forth in subsection (c)."

Note: For cases, commentary, litigation papers and other materials on Title I, see Title I Litigation Packet, available from the Center for Law and Education.

VOCATIONAL EDUCATION AMENDMENTS OF 1968 (P.L. 90-576)

Title I—Vocational Education: The Vocational Education Act provides that ten percent of funds for vocational education must be spent for the handicapped. (*Sec. 122*) This program is designed to provide an effective vocational education program for the handicapped and to develop new programs relating to the vocational education needs of the handicapped. A National Advisory Council on Vocational Education is created and must have one member of the Council "experienced in the education and training of handicapped persons." State advisory councils on vocational education are also required to have a member "having special knowledge, experience, or qualifications with respect to the special educational needs of physically or mentally handicapped persons." Members are to be appointed by the elected state boards of education or by the governor. (*Sec. 104*)

The vocational education program operates through an approved state plan with 50 percent matching state funds. (*Sec. 103*)

Vocational education is defined in the following manner:

"The term 'vocational education' means vocational or technical training or retraining which is given in schools or classes (including field or laboratory work and remedial or related academic and technical instruction incident thereto) under public supervision and control or under contract with a State board or local educational agency and is conducted as part of a program designed to prepare individuals for gainful employment as semiskilled or skilled workers or technicians or subprofessionals in recognized occupations and in new and emerging occupations or to prepare individuals for enrollment in advanced technical education programs, but excluding any program to prepare individuals for employment in occupations which the Commissioner determines, and specifies by regulation, to be generally considered professional or which requires a baccalaureate or higher degree; and such term includes vocational guidance and counseling (individually or through group instruction) in connection with such training or for the purpose of facilitating occupational choices; instruction related to the occupation or occupations for which the students are in training or instruction necessary for students to benefit from such training; job placement; the training of persons engaged as, or preparing to become, teachers in a vocational education program or preparing such teachers to meet special education needs of handicapped students; teachers, supervisors, or directors of such teachers while in such a training program; travel of students and vocational education personnel while engaged in a training program; and the acquisition, maintenance, and repair of instructional supplies, teaching aids, and equipment, but such term does not include the construction, acquisition, or initial equipment of buildings or the acquisition or rental of land. (*Sec. 108*)

The above summaries of Title I ESEA and the Vocational Education Amendments are reproduced here with the permission of the Council for Exceptional Children (CEC), 1920 Association Drive, Reston, Va. 22091, from pages 6-10 of section 52 of Digest of State and Federal Laws: Education of Handicapped Children (3rd Ed., 1974). The Digest also includes summaries of the following federal laws:

Title VI, ELEMENTARY AND SECONDARY EDUCATION ACT AMENDMENTS OF 1969 (P.L. 92-230)(as amended by P.L. 93-380, the Education Amendments of 1974).

THE REHABILITATION ACT OF 1973 (P.L. 93-112). See VI.A. supra.

THE ECONOMIC OPPORTUNITY ACT AMENDMENTS OF 1972 (P.L. 92-424).

TITLE III, ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (P.L. 89-10) (As amended by P.L. 93-380).

GALLAUDET COLLEGE (P.L. 83-420). A private, non-profit educational institution providing an undergraduate and graduate program for the deaf.

MODEL SECONDARY SCHOOL FOR THE DEAF ACT (P.L. 89-694).

NATIONAL TECHNICAL INSTITUTE FOR THE DEAF ACT (P.L. 89-36).

HIGHER EDUCATION AMENDMENTS OF 1972 (P.L. 92-328).

SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS (SAFA OR "IMPACT AID") P.L. 81-874 (as amended by P.L. 93-380).

ADULT EDUCATION (P.L. 91-230, TITLE III, as amended by P.L. 93-380, TITLE VI, PART A, SECTION 603).

DEVELOPMENTAL DISABILITIES SERVICES AND FACILITIES CONSTRUCTION AMENDMENTS OF 1970 (P.L. 91-517).

TITLE V, SOCIAL SECURITY ACT OF 1935 AS AMENDED.

AN ACT TO PROMOTE THE EDUCATION OF THE BLIND (1879).

ELIMINATION OF ARCHITECTURAL BARRIERS TO THE PHYSICALLY HANDICAPPED IN CERTAIN FEDERALLY FINANCED BUILDINGS (P.L. 90-480).

EDUCATION OF THE GIFTED AND TALENTED (P.L. 93-380, TITLE IV, Section 404).

See III.D.5. supra for the Family Educational Rights and Privacy Act (the "Buckley Amendment") setting forth standards for access to and dissemination of student records, and III.D.6. for special regulations regarding records of handicapped children.

See II.A.A. supra for summary of Title IX of the Education Amendments of 1972 prohibiting discrimination in federally assisted education programs against students and employees on the basis of sex.

MICHAEL